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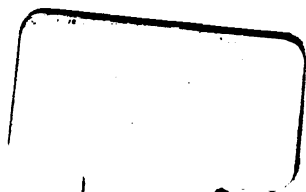
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1860





THE  
**LAW CHRONICLE**

AND

*Law Students' Magazine.*

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FROM JANUARY TO DECEMBER, 1860.

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# INDEX.

- Account, back rents, 6  
bill, 125
- Accumulations, 6
- Action, notice, 48, 107
- Administration, abroad, 20  
account of debts, 170  
assets, 44  
husband, 67  
limited grant, 114  
testamentary intention, 181
- Admiralty Court, 38—40
- Adulterations, 178
- Agreement, stamp, 72, 177
- Animals, cruelty, 159
- Anniversaries, 5
- Annuity, usury, 66
- Appeal, forfeiture, 179
- Apprentice, wages, 116, 160
- Apportionment of conditions, 74
- Appropriation, payments, 127
- Arbitration, bankruptcy, 48  
costs of counsel, 156  
legal assistance, 108  
special case, error, 118
- Articled clerks, examinations, 88, 89  
enrolment of articles, 124  
graduates, 87, 89  
managing clerks, 88  
notices, omission, 156  
pauper, 124  
registration, 88
- Assault, drugs, 72
- Assignment, notice, 25  
to self, 77
- Attorney, dealings with client, 127  
mortgage, 10  
payment of bill, 140  
striking off rolls, 128  
taxation of bill, 140  
trustee, costs, 13, 127  
undue pressure, 140
- Auctioneers, deposit, 148—150
- Award, setting aside, 19
- Bankruptcy, allowances, 21,
- Bankruptcy allowances, 49,  
arrangements, 21, 68, 158  
assets by petitioner, 28  
composition, 49  
contract for composition, 181  
defending suit, 108  
departure, 158  
examination, 21  
opening, time, 22  
petitioning creditor's debt, 80  
reputed ownership, 22  
reputed ownership, bill of sale, 108  
surplus, 109  
trading, single work, 28  
Bigg's statutes, 97—100
- Bill of exchange, indorsement in blank, 14  
stamp, 67  
summary remedy, 115
- Bill of sale, attesting witness, 14  
bankruptcy, 108  
description of grantor, 47  
receipt, 47
- Brawling, 147
- Building, contract, extras, 128  
societies, redemption, 118
- Carrier, limiting liability, 141, 142
- Champerly, 128
- Charity, legacy, 45  
scheme, 125
- Church, ornaments, 158
- Coinage, 6
- Colonies, lawyers in, 121
- Combinations, 2
- Commission, good ordered, 153
- Common, fractional parts, 129
- Conditions, apportionment, 74—76
- Coote's Admiralty, 38
- Coote's Probates, 186
- Copyhold, clay, 142
- Copyright, music, 15
- Coroner, bail, 4
- Corporations, injunctions, 184  
injury by, 16
- CORRESPONDENTS ON MOOT POINTS, 54—56, 63, 93
- Covenant, waiver of, 168
- County Courts, committal, 4  
costs, 24  
jurisdiction, order, 24
- Criminal law, appeal, costs, 159  
appeal, time, 25  
certiorari, costs, 119  
coroner, 4  
false pretences, 109  
game, 24  
highway, obstruction, 32, 110  
indictments, vexatious, 3  
pauper, 25  
poor-rate, distress, 119  
special case, 106
- Crowder, Just., 86
- Crown debts, satisfaction, 177
- DEBATING SOCIETIES, 72, 96
- Descent, 32
- Devise, die without issue, 54  
not to sell, 7  
renewal of lease, 53  
tail, 115  
vested, 30, 71
- Diseases, prevention, 171—173
- Distress, excessive, 154  
pound, 154  
tender, 48  
time, day, 153
- Divorce, Scotch, 51
- Donatio mortis causa, 7
- Dower, 32  
attendant term, 72  
barring, 124  
proceedings, 182
- Ejectment, tenants in common, 19

- Election, will, 152  
 Emblements, 81  
 Estate tail, disentailing, 128  
     male, 150  
 Evidence, old deed, 129  
     parol, 105  
 EXAMINATIONS, RESULT, 37, 90  
 Exocutors, breaches of covenant, 7  
     corporation, 113  
     power of sale, 176  
     residue, 72  
 False imprisonment, 47, 106  
 Felony, action suspended, 101  
 Feme covert, choses in action, reduction, 117  
     equity to settlement, 64, 160, 117, 138  
     money out of court, 46  
     mortgage, 45  
     separate estate, 8  
     separate estate, liability, 100  
     will, 12  
 Forfeiture, insurance, 101  
     insurance, relief, 178  
     relief, 5  
     rent, relief, 178  
 Francillon's Lectures, 82—84  
 Future-acquired goods, 13  
     Gas act, 2  
     Gift, deed, 17  
     Glen's Highways, 188  
     Grand juries, 3  
 Horsey's Law of Property Act, 73—82  
 Hunter's Law of Property, 189  
 Hunter's Law Reform, 86  
 Illegitimate children, gifts to, 139  
 Income-tax, 146  
 Infant, custody, 7  
 Injunction, watercourse, 64  
 Innkeeper, gaming, 160  
     liability, 154  
 Insolvency, future-acquired property, 68  
     parting with prop. ty, 50  
     property, mortgage, 22  
     rescinding final order, 28  
     setting aside income, 68  
 Insurance, forfeiture, 76  
     relief, 101, 179  
 Interest, 102  
 Interpleader, extended, 180  
     Interpleader, sale, 180  
         sheriff, 44  
         special case, 180  
     Joinder, too many parties, 181  
     Judges, old and new, 36  
     Judgments, 57—60, 177  
         affecting lands, 165  
         leaseholds, 57, 59  
         Middlesex, 58  
         notice, 57  
         registering, 165  
         re-registering, 167  
         satisfaction, 177  
         searches, 59  
         unregistered, 57, 58, 166  
     Keating, Just., 86  
     Law and Equity, new Act, 178—184  
     Lease, lives, 96  
         outgoings, 92  
         power, 64  
         waiver of condition, 168  
     Legacy, redemption, 8  
         assent, 17  
         charged on land, raising, 138  
         cumulative, 45  
         duty, 144, 175  
         exoneration, 152  
         next of kin, 125  
         shares, calls, 101  
     Limitations, stat., acknowledgment, 17, 152, 159  
         intestacy, suit, 169  
     Long Parliament, 133—135  
     Lost bill, 14  
     Lunacy, carriage, 64, 66  
         costs, 9  
     Lunatic asylums, 170, 171  
     Maintenance, 128  
     Marriage, dissolution, 50, 113, 148  
         evidence, foreign, 143  
         promise, 107  
     Master and servant, 28, 83, 86  
     Misjoinder, 181  
     Misrepresentation, 101  
     Mistake, payment, 129  
     MOOT POINTS, 27, 51, 52—54, 68—70, 93—96, 110—112, 115, 122, 131, 144, 174, 190  
     MOOT POINTS, ANSWERS, 28—32, 52—54, 71, 96, 112, 115, 124, 144, 160, 175, 191  
     Mortgage, cum onere, 125  
     Mortgage, cum onere, 126  
         equitable, costs, 125  
         equitable, liability, 53  
         foreclosure, 64  
         forfeiture, 160  
         negligence, 126, 138  
         paying off, trust money, 175  
         power of sale, 150  
         receipt clause, 168  
         tacking, 126  
         tenancy, 17  
         transfer, 159  
     Mortmain, subsequent dealings, 139  
         tolls, 152  
     Municipal corporations, 5  
     Negligence, damages, 142  
     New Books, 73—87, 97—100, 120—122, 133—136, 185—190  
     Notice to quit, service, 154  
     Nuisance, fence, 107  
     Nuisance, removal, 171—173  
     Oaths, commissioners, 4  
     Oke's Highways, 186  
     Oke's Magisterial Synopsis, 185  
     Outlawry, effect, 67  
     Overseers, 160  
     Partners, bill of exchange, 153  
     Partnership, dissolution, 9  
         goodwill, 151  
         sale, 29  
     Patent, assignment of part, action, 107  
         extension, 107  
         inspection, 103  
     Pawnbrokers, 1  
         fire, 25  
     Penalty, remitting, 4  
     Pensions, elections, 6  
     Petitions of right, 147  
     Playgrounds, 6  
     Poison, new Act, 145  
     Poor-rate, fraction, 160  
     Power, attorney, effect of, 103  
     Practice, Common Law, amendments, 184  
         costs, arrest of judgment, 118  
         bail, deposit, taking out, 48  
         confession, costs, 157  
         consolidation, 19  
         costs, discontinuance, 67  
         costs, injury, £5 not recovered, 184

- Practice, Common Law,  
costs, security, 108  
execution, costs, 119  
execution, rent, 155  
garnishment, 30, 188  
garnishment, lien, 188  
garnishment, officer's  
commission, 180  
injunction, 183  
inspection, 156  
irregularity, 156  
mandamus, 188  
new trial, seduction, 108  
payment into court, 182  
security for costs, soldier,  
119  
special case, 157, 181  
summons, service, 68  
venue, change, 49  
witnesses, non-payment,  
180
- Practice, Equity, abate-  
ment, marriage, 92  
account of debts, 170  
answer, reading, 105  
appeal, 118  
appeal, staying proceed-  
ings, 118  
certificate, objections, 46  
conduct of suit, 46  
costs, 140  
costs, apportionment, 104  
counsel, three, 104  
decree, altering, 152  
dividends to tenants for  
life, 105  
infant, guardian, 140  
infant, petition, 105  
infant, suit for, 118  
investments, 168  
parties, representative, 47  
payment out, disentailing  
deed, 105  
pro confesso, 92  
substituted service, 128,  
141  
two suits, staying one, 47  
Privileged communications,  
155  
Probate, caveat, 157  
costs, 67  
duty, purchase - money,  
180  
Property, Law of, new Act,  
165—170  
Public company, bill of ex-  
change, 109  
compromise, 127  
contract with director,  
46  
Public company, contri-  
butory, 9, 65  
conveyance, 108  
costs, 66  
investments, costs, 118  
limitations, stat., 103  
part of building, 45  
proceedings, 65  
two petitions, 158  
Quakers, 5  
Quare impedit, proceedings,  
182  
Quo Warranto, 160  
Rabbits, killing, 24  
Railways, arbitrations, 2  
Railway company, limiting  
liability, 141, 142  
Rent, double, 82  
Repairs, 144  
Replevin, 182  
payment into court, 182  
Reports, 135, 186  
Rifle corps, insurance, 53  
Saving-banks, 6  
Scotch law, 104  
Separation, judicial, 114,  
157  
Servant, injury to by an-  
other, 18  
negligence, 81, 82  
Set-off, 182  
Settled estates, setting down  
petition, 128  
Settlement, heir-looms, 151  
next of kin, 117  
Sheriff, false return, 18  
return to writ, 20  
Shipping, freight, 19  
contribution, 1  
registry, 142  
Stamp Acts, 1, 146  
new Acts, 177  
Statutes (22 & 23 Vict.) 1,  
—6, (28 & 24 Vict.),  
145—147, 165—174—  
177—184  
Stephen's Lush's Practice,  
188  
Stock, re-transfer, 10  
Stoppage in transitu, 71  
Succession-duty, appoint-  
ment, 112  
SUMMARY OF DECISIONS,  
6—25, 44—51, 64—  
68, 92, 100—110, 118,  
117—120, 125—131,  
138—148, 150—160,  
Sunday, reckoning, 25  
Surety, discharge, 129  
release, 106  
Tenant for life, charge, 10  
timber, 92  
Tender, joint-tenants, 106  
Toll, milk, 109  
mortgage, 11  
Trade, restraint, 65  
Trover, re-sale, 180  
Trustees, advice, 5, 66, 168  
bankruptcy, 127  
delay to convert, 11  
disclaimer, 96  
investment, 104, 169  
lunacy, 12  
new, appointing, 139  
receipts, 78—80  
relief, 12  
vesting order, 11  
sale by some, 124  
Trusts, devise, 31, 52  
precatory, 12  
Undue influence, 127  
Use and occupation, 155  
VENDORS, 25, 33—35, 61—  
63, 110, 186  
assignee in insolvency, 61  
breach of covenant, da-  
mages, 110  
charge of debts, sale, 186  
death after decree, 61  
deposit, forfeiture, 116  
executors, power of sale,  
176  
insufficient title, 33  
misdescription, 187  
power of sale, charge of  
debts, 26  
specific performance, 33  
—35, 61  
taking possession, 115,  
124  
title-deeds, 35  
uncertainty, 137  
Voluntary conveyance, 139  
Waste, executory devise,  
139  
Weights and measures, 2  
Wharton's Law Lexicon, 41  
Will, erasure, 157  
insanity, 20  
proof, costs, 157  
re-execution, 148  
revocation, imperfect, 148

## THE LEGISLATION OF 22 & 23 VIC.

Mr. Samuel Warren, Q.C., Recorder of Hull, in opening the sessions for that district, delivered an address to the grand jury, in which he laid before them the principal fruits of two sessions' legislation. The learned Recorder said: Between the 25th of March and the 10th of April in this year, were passed thirty-five public and general statutes; and between the 21st of July and the 13th of August, sixty-six public statutes—making in all, 101 public and general acts of Parliament. I shall give you for your practical guidance in your public and private capacities, something like the pith, or at least the general scope of some twenty-eight of them: dividing them into classes as conveniently as I am able—but reminding you that those acts which I leave untouched are yet all of them of greater or less public importance. I shall begin with a class of new acts of Parliament which need to be only mentioned to come home to the business and bosom of every member of this extensive and influential section of the mercantile community. I mean those relating to trade and commerce, and which, when collected together, will perhaps surprise you by their extent and practical importance, however quietly and unobservedly they have passed through the legislature. They are eight in number. The first (22 & 23 V. c. 14) relieves pawnbrokers from being harassed by frivolous and oppressive informations by common informers, by inflicting penalties on those compounding informations, awarding amends for those which are frivolous, lessening the shares allotted to informers, and mitigating penalties; in fact, extending four sections of a salutary London Police Act to the General pawnbroker's Act, 39 & 40 Geo. 3, c. 99, passed in the year 1800. The second (c. 36) alters the stamp duties in respect of probates and letters of administration, where the value amounts to a million sterling, and upwards—perhaps a matter not likely materially to affect you and me, though there is no knowing, as far as you and others here are concerned!—repealing the £15 stamp on licences to practice the faculty of physic; enabling the real worker or maker of manufactured articles, or his children, apprentices, or known agents or servants, to carry abroad and expose for sale such articles, at any place whatever, in Great Britain; and empowering justices to mitigate to one-fourth, a penalty incurred by a hawker or pedlar. The third (c. 37) repeals stat. 3 & 4 Will. 4, c. 101, relating to the duties on tea; enacts that freight is to be paid before the delivery of the goods from the Queen's warehouse, the Customs officers being empowered to refuse such delivery till satisfied of such payment. The act contains other important provisions with reference to the illegal removal of goods under bonds for exportation, the correctly stating goods in the declaration on shipping bills, and other kindred matters, all which are, or ought to be, already familiar to the inhabitants of this port. The fourth (c. 44) continues till 1862, and the end of the then next session of Parliament, the act exempting stock in trade from being rated. The fifth (c. 56) makes care-

ful provision against the use of defective or fraudulent weights and measures—among other things, extending the power vested in the inspectors: the 4th sec., I may mention, depriving me of the only little piece of patronage till then vested in me as your Recorder—viz., the appointment of the inspector—a right vindicated in the case of my predecessor, Mr. Baines, by the Court of Queen's Bench, twenty years ago. It is now properly vested in the town council. The sixth (c. 59) is entitled the "Railway Companies Arbitration Act, 1859," and confers on those companies a series of the amplest powers for submitting their differences with other companies effectually to arbitration, instead of exhausting their funds in expensive and often utterly abortive litigation in courts of law and equity. The seventh (c. 66) is a very important practical statute of twenty-eight sections, for regulating measures used in the sale of gas, for lighting, heating, and any other purpose—for regulating the measurement by one uniform standard only, strictly specified in the act, and requiring gas meters to be stamped as therein minutely provided for, so as to afford every practicable security against fraud on either sellers or buyers of gas. An inspector of meters is appointed, whose powers and duties are carefully defined; rules are given by which he is to test meters; and provision is made for subjecting his decision, and that of two brother inspectors to whom he may refer disputes concerning his decision, to an appeal to this court, which may reverse or alter his decision, mitigate the penalties or forfeitures he may have imposed, order the return of money levied under his order, and such further satisfaction, to a complaining party, as the court may judge reasonable, and order costs to be paid by either party to the other. The option to adopt the act in boroughs is given to town councils, subject to certain conditions, and if they fail to do so, then to the justices. The act applies to the whole United Kingdom, and all persons using gas in their houses or places of business should make themselves at once acquainted with its provisions. The eighth and last act of this class is a very brief one, relating to a subject at this moment exciting great interest and anxiety in the metropolis and elsewhere—I mean that of "strikes" and "lock-outs," as they are called. The act repealing the Combination Laws in 1825 (6 Geo. 4, c. 129) by sec. 8, made the "molesting" or "obstructing" by any person of another, in order to enforce on employers an alteration in carrying on their business, an offence liable to imprisonment with or without hard labour, for three calendar months. These two words, "molesting" and "obstructing" having occasioned difficulty to the courts in considering them, the new act simply declares what shall not amount to such, namely, a workman's merely entering into an agreement with others to fix the rate of wages at which they shall work; or merely endeavouring peaceably, reasonably, and without direct or indirect threat or intimidation, to persuade others not to work, in order to obtain the desired rate of wages, or altered hours of labour fixed or agreed upon by themselves; but the act provides that nothing contained in it shall authorise any workman to break or depart from any contract or authorise any

attempt to induce any workman to do so. Gentlemen, I make no observation on the policy of either of these two acts of 1825 and 1859, nor shall I allude to the unhappy schism at present existing between masters and men—between the representatives of capital and labour. So much for the first class of new acts of Parliament. I come now to a second: those affecting the administration of justice, civil and criminal—and here you will find that the legislature has indeed bestirred itself to some purpose, and in a manner highly creditable to it; evincing at once liberality, boldness, caution, and a steady aim at practical utility; removing obstacles from the administration of justice, protecting the public against the nefarious abuse of the terrors of the criminal law, extending the efficiency of our tribunals in some cases, properly abridging their actions in others, greatly improving the law of property, and relieving honest trustees from difficulty and danger. These acts are thirteen in number. First in importance and interest, and as affecting us in this court, is 22 & 23 Vic. c. 17—entitled “an Act to prevent vexatious Indictments in certain Misdemeanors”—for which we are indebted to the present Lord Chancellor, who, while Lord Chief Justice of England, often and loudly inveighed against the abuse, which he has at length remedied. Those abuses consist, in a word, of prostituting previous facilities for preferring bills to grand juries for the purpose of extortion, oppression, and the gratification, with comparative impunity, of private malignity. Since the 1st day of September last no bill of indictment can be either presented to or found by any grand jury, without the performance of certain previous statutory conditions, which I shall immediately specify, in any of the following five cases: Perjury (and subornation of perjury), conspiracy, obtaining money or property by false pretences, keeping a gambling or disorderly house, or indecent assaults. The statutory conditions are four in number: First, the person prosecuting the bill being under recognisance to prosecute or give evidence; or, secondly, the accused person having been committed to, or detained in custody, or bound by recognisance to answer the charge; or thirdly, in the respective case of offences charged to have been committed in England or Ireland, the indictment being preferred by the direction, or with the consent in writing, of a judge of one of the superior courts of law at Westminster or Dublin, or of the respective attorneys or solicitors general; or lastly (in the case of perjury), by the direction of any court, judge, or public functionary, authorised by a recent statute (14 & 15 Vic. c. 100, s. 19), to commit any person for trial, if of opinion that wilful and corrupt perjury has been committed by a person in giving evidence, and there appear a reasonable cause for such a prosecution. If, however, a charge or complaint that any of the above offences have been committed be made before a magistrate, who refuses to commit or hold to bail the accused, the magistrate may be required by the prosecutor to take his recognisance to prosecute, and transmit it, with the information and depositions, in the ordinary course, to the court in which such indictment should be preferred. The prosecutor will thus be forced to proceed, or forfeit his



recognisances. By these means are remedied two crying evils—the preferring indictments to grand juries behind the back of the accused, and the facility of instituting such serious and harassing proceedings for the purpose merely of oppression, extortion, or revenge. This act does not apply to Scotland; but a second (c. 7) does, and exclusively—and it allows a Scottish jury, in a civil cause, after three hours' deliberation, if nine or more of them are agreed, to return a verdict equally valid as though unanimous; but if, after being kept in deliberation six hours, nine cannot agree, the judge may discharge the jury without any verdict. This Act, I say, applies to Scotland only. Whether it is to be regarded as the herald of a similar change is another and a very serious matter. A third act (22nd Vic. c. 33) enables a coroner, where the jury have returned a verdict of manslaughter, if he shall think fit, to admit to bail the person so charged who is also entitled to copies of the depositions. A fourth act (22 & 23 Vic. c. 6) throws open the Court of Admiralty to the legal profession at large—serjeants, barristers, and attorneys and solicitors—a change in the law which I tried hard to effect when in Parliament. A fifth act (c. 21), effects extensive improvements in the practice and procedure on the revenue side of the Court of Exchequer. A sixth act (c. 57) restricts the power of county court judges to commit a defendant to prison, unless satisfied that credit had been obtained by fraud, breach of trust, or after wilfully contracting the debt without having had at the time a reasonable expectation of being able to pay; or that the defendant has given, transferred, removed, or concealed the property, with intent to defraud his creditors, or has neglected or refused to pay the debt or damages awarded, having had sufficient means and ability to do so. A seventh act (c. 61) increases the judicial staff of the Court for Divorce and Matrimonial Causes, and adds further provisions to meet the exigencies of this newly-established and most important tribunal. The eighth act (22 Vic. c. 25) enacts a complete code of regulations for the government of convict prisons in her Majesty's dominions abroad. A ninth and tenth act (22 Vic. c. 20, and 22 & 23 Vic. c. 63) respectively afford valuable facilities for ascertaining more certainly than heretofore the law administered in all parts of her Majesty's dominions, when pleaded in other courts thereof, and for taking evidence in proceedings pending before tribunals in her Majesty's dominions in places out of the jurisdiction of such tribunals. Those practically acquainted with the administration of the law will appreciate the usefulness of these provisions. An eleventh act (22 Vic. c. 16) empowers the judges of the common law courts to appoint “London commissioners to administer oaths in common law (being practising attorneys) within ten miles of London, and in the Isle of Man and Channel Islands; thereby, as the act correctly recites, much promoting the convenience of suitors, witnesses, and deponents, saving expense, and expediting and facilitating the business of the courts. A twelfth act (22 Vic. c. 32) benignantly empowers the Crown to remit, in whole or in part, any penalty or forfeiture on a convicted offender, though payable wholly or in part to some party other than the Crown, and to

extend the royal mercy to any one imprisoned for non-payment under such circumstances, and thus to clip the wings of vindictive and mercenary reformers. The thirteenth (and last) act of this class is one of great importance, but I can do here nothing more than slightly indicate its leading features. It is the product, almost entirely, of the vast experience and learning of Lord St. Leonard's. Its title is a very short and modest one, "An Act further to amend the Law of Property, and to relieve Trustees;" but it effects changes of great practical value in both directions, many of which it would be impossible for me here to explain properly to non-professional persons. A feature or two, however, I may point out. One is the relief afforded by a court of equity against a forfeiture for breach of covenant, or condition, to insure against fire, where no loss or damage has occurred, and the breach has been committed through accident or mistake, and without fraud or gross negligence, and there is afterwards a policy on foot in conformity with the above covenant or condition; but this relief can be given only once in respect of the same covenant or condition. Passing over various other important and beneficial provisions, I come to the close of the act, which contains seven clauses conferring great relief on honest trustees, placed in circumstances of difficulty. One of such clauses (sec. 30) enables a trustee, executor, or administrator to apply summarily to an equity judge for his opinion, advice, and direction; and acting honestly in conformity therewith, he will be absolved from all responsibility if he has acted *bonâ fide* in all respects in seeking such opinion and advice. This is a wise complementary provision to the recent act so gravely augmenting the civil and criminal responsibility of trustees. I come, in conclusion, to a third—the last, and a somewhat miscellaneous—class of statutes of the last session—those of more general and public importance; but out of these I can select, limited as I am for time, only a very few as challenging special notice. 1. Foremost there is one of great importance and interest to this and all other boroughs, 22 Vic. c. 35—the act to amend the law relating to municipal elections, its statutory title being "The Municipal Corporation Act, 1659." It contains sixteen sections: providing for the division of a borough into wards, or altering existing divisions, and appointing councillors accordingly; for the notice of their election, their nomination, and election, with elaborate provisions for preventing and punishing offences connected with such elections, personation of voters, bribery and forgery of nomination of voting papers; carefully defining the word "bribery," and assimilating it to bribery, in the case of Parliamentary elections. 2. Statute 22 Vic. c. 10, settles a form of affirmation in the case of Quakers and others permitted by law to make a solemn affirmation or declaration instead of taking the oath prescribed by statutes 21 & 22 Vic. c. 48, in lieu of the previous and long-established oaths of allegiance, supremacy, and abjuration, and for the relief of those professing the Jewish religion. 3. Statute 22 Vic. c. 2, repeals all previous enactments for the religious observance of the 30th of January (the death of Charles I), the 29th of May (the Restoration), and the 5th of November (the anniversary of the

Gunpowder Plot). 4. Statute 22 Vic. c. 27, facilitates grants of land to be made near populous places, for the use of regulated recreation of adults, and as play-grounds for children. 5. Statute 22 & 23 Vic. c. 30, contemplates her Majesty's causing to be issued for public convenience coins of bronze or mixed metals, instead of copper monies; and extends to all such new coinage the existing enactments applicable to offences against or relating to the current copper coin. 6. Statute 22 & 23 Vic. c. 53, enables charitable and provident societies, and penny savings' banks, to invest all their proceeds in savings' banks. 7. Statute 22 & 23 Vic. c. 5, affects the constitution of the Legislature. It removes doubts which had arisen on the subject, by enacting and declaring that pensions granted for diplomatic services shall not disqualify the holder from being elected, or sitting, or voting, as a member of the House of Commons.

## Summary of Decisions.

### CONVEYANCING AND EQUITY.

**ACCUMULATION OF INCOME.**—*Thellusson Act*—*Indemnity fund not within the Act.*—The 39 & 40 G. 3, c. 98, provides that no direction for the accumulation of the income of property (real or personal) shall be valid, if for longer than the life of the grantor, or twenty-one years from the death of such grantor, or any devisee, or during the minority of any one living or in ventre sa mère at the time of such death, or during the minority of any one who would under the deed or will be entitled, if of full age, to the income so directed to be accumulated; but this does not extend to provisions for payment of debts or for raising portions for children, or as to the produce of timber or wood. The act does not apply to cases of accumulations of surplus income to form an indemnity fund in respect of the property devised. Thus, it has been decided that a direction to accumulate the surplus income of certain shares beyond a certain amount as a bona fide sinking fund for the protection of the shares, is not within the above act, nor would, per M. R., a direction to accumulate the surplus rents of leaseholds to provide an indemnity fund against the covenants of the lease. *Varlo v. Faden*, 8 W. R. 2.

**ACCOUNT.**—*Back rents*—*Misapplication of rents by committee of lunatic*—*Committee's final account*—*Occupation rent*—*Allegation of fact on affidavit dehors the bill and answer.*—Where a person files a bill simply claiming an estate, and asking the court to give him the back rents also, the court may apply the rule limiting the account to the filing of the bill. But where the circumstances are special—such as where the person entitled was a lunatic, and his committee in possession did not apply the rents for the lunatic's benefit, and on his death his personal representative filed a bill to obtain them—the court will not apply the rule. Where the committee of a lunatic received rents of his estate, and on the supposition that the right to those

rents was not in the lunatic but in a third person, paid them to such third person, the committee was not allowed to set up his final account passed in the lunacy as an answer to the claim of the lunatic's personal representative to the rents. Where a stranger occupies property under the erroneous belief that it is his wife's separate estate, or that he is entitled to occupy it, he will be charged with occupation rent accordingly. *Wright v. Chard*, 1 Law Tim. Rep. N. S. 138.

**CUSTODY OF INFANTS.**—*Jurisdiction of the court—Paternal rights.*

—The Court of Chancery does not exercise its jurisdiction in the custody of infants upon the mere consideration of what may be most for their benefit, and it will not deprive a father of the right to the custody which the law gives him of his children, or restrain him from obtaining possession of them, unless it clearly appears that he is so unsound in mind as to be morally depraved, or is in the habit of physically and cruelly illtreating them. *Curtis v. Curtis*, 34 Law Tim. Rep. 10.

**DEVISE.**—*Direction not to sell or mortgage.*—The proper mode of providing in a will against the disposition of property thereby devised for a limited interest to a person not under coverture, is either to make the gift until alienation or to provide for cesser on alienation, thus depriving the party of any possibility of future benefit from the provision (see 11 Jarm. Conv. by Sw. 486, 548, 552, 718). A mere direction in a will that no sale or mortgage shall be made by the devisee will go for nothing, unless the estate be properly limited to him. *Goulden v. Cam*, 8 W. R. 3.

**DONATIO MORTIS CAUSA.**—[F. Bk. 205]—*Unendorsed promissory note.*—It has always hitherto been considered, that so long as anything remained to be done, a delivery of a chattel, &c., by a person in extremis to another for the latter's benefit, did not constitute a good donatio mortis causa, and that, therefore, where the thing delivered is a negotiable instrument, such as a bill or note payable to order, there must be an indorsement of it by the donor (see *Duffield v. El.*, 1 S. & S. 239; *Miller v. Mi.*, 3 P. Will. 356). However, the Master of the Rolls on the authority of a decision not reported, but noticed in *Chitty on Bills*, p. 2, 9th ed., has held, that a delivery by the deceased of an unindorsed promissory note is a sufficient delivery to constitute a good donatio mortis causa. *Veal v. Veal*, 8 W. R. 2.

**EXECUTORS.**—*Liability of, for testator's breach of covenant to insure.*—

A person appointed an executor may refuse to take upon himself the executorship, and if he accepts the office, he does not become liable in respect of a breach of covenant happening in the meantime. A testator who was, at his death, lessee of a house under a lease, in which he had covenanted to keep the house insured, appointed A. his son, his executor. The testator had effected a policy of insurance. The policy expired on the 25th of March. The testator died on the 27th of March. The house was burnt down on the 26th of May. A. proved the will on the 17th of June. Evidence was given, that between the death of the testator and the 26th of May. A. had received money of some of the customers of the testator, who

had been a tradesman. Held, that A. was not liable in respect of the breach of the covenant. *Fry v. Fry*, 28 Law Journ. Rep. Ch. 593.

**FEME COVERT.**—*What words create an estate to the separate use of a married woman—To receive the rents herself whether married or single.*—It is occasionally very difficult to decide, whether the words of a will giving an interest to a married woman constitute or not a gift to her separate use (see List of Expressions in 2 Story's Eq. Jurisp. ss. 1382, 1383). In *Tyler v. Lake* (2 R. & My. 183) Lord Brougham expressly laid it down, that "if a sufficient strength of negative words is not to be found in the gift or limitation, you are not allowed to fish about for indications of intention from other parts of the instrument." The words there were "to pay into the proper hands of A.," which was held not to create a separate use. So the words "for her own use and benefit," are not sufficient. In the following case it was held, following *Blacklow v. Laws* (2 Hare, 40), that a devise to trustees "for the use and benefit" of a woman, "she to receive the rents from the tenants herself, whether married or single," accompanied with a direction that she should not make any sale or mortgage, does not create a separate use. *Goulden v. Cam*, 8 W. R. 3.

**FEME COVERT.**—*Liability of—Separate estate for—Breach of trust—Difference—Where anticipation restrained, and where not.*—As to property settled to the separate use of a married woman and nothing to restrain her anticipating the same, she is a feme sole in respect thereof, and a breach of trust by her must be answered out of that property, just as much as a breach of trust by a man or a single woman. But property settled to the separate use of a married woman without power of anticipation cannot be applied to make good a breach of trust committed by her; and the circumstance that she herself was the settlor makes no difference. *Clive v. Carew*, 28 Law Journ. Rep. Ch. 685.

**LEGACY.**—*Ademption* [4 L. C. 132; 5 L. C. 20, 132]—*Satisfaction* [4 L. C. 209]—*Share of residue.*—Until the case of *Pym v. Lockyer* (5 Myl. & Cr. 29; and see *Thynne v. Glengall*, 2 H. L. 131), it was thought that ademption of legacies, if it took place at all, must be total; but it was then settled that there might be a *partial* ademption. The doctrines of satisfaction and ademption rest on the same grounds, namely, that a parent does not intend to perform the duty twice of providing for his child. There is not the same difficulty in presuming ademption pro tanto as total ademption. Where there are two funds out of which the ademption may take place, as a legacy of a particular amount and a gift of residue, in general the gift ought to be considered as being out of the fund given absolutely, but it is a question of intention. These matters were fully considered in the following case, where it was held that a residuary bequest to a child may be adeemed by a subsequent gift of a portion, in the same manner as a legacy of fixed amount, either entirely or pro tanto. The fact that the trusts of a bequest and those of a subsequent portion are slightly different, will not prevent the former from being adeemed by the latter. Where there are two bequests to a child, one of which is to be adeemed by a subsequent portion, that

bequest ought, *prima facie*, to be adeemed which most resembles the portion, but the intention of the testator must govern the question. A testator gave a legacy of £300 to his son, absolutely, and then gave one-third of the residue upon trust for the same son for life, with remainder to his children, afterwards the son married, and the testator then settled £2000 on his son's wife for life, with remainder to his son for life, with remainder to their children: Held (dubitante, Knight Bruce, L. J.), on the construction of the whole will, that the share of the residue, not the legacy of £3000, was adeemed, *pro tanto*, by the portion given on the son's marriage: *Montefiori v. Guedalla*, 8 W. R. 53.

**LUNACY.**—*Supersedes on recovery—Costs.*—A person had been duly found lunatic by inquisition, but before a committee of person or estate had been appointed, and before any report as to his estate had been made he recovered his reason. A supersedeas of the commission was ordered. The court has no jurisdiction to order the party who sued out the inquisition to be paid his costs out of the estate. *In re ——— a Lunatic*, 28 Law Journ. Rep. Ch. 644.

**PARTNERSHIP.**—*Misrepresentation—Return of premium—Dissolution.*—We have seen that where a partnership cannot be conducted upon the footing originally contemplated without injury to the partners, a dissolution will be decreed, and so where the objects of the partnership have wholly failed (Propositions, p. 21, No. xi.; 4 L. C. 171). The following case may be added to these, as showing that the mere fact that business cannot be carried on profitably will not be a sufficient ground for equity decreeing a dissolution. B., a practising surgeon, took C. into partnership, having represented to him that his practice produced about £700 a year. C. paid a premium. It was afterwards discovered that the practice did not amount to more than half the amount stated, and also that B. had, the year previous to the partnership, made a return to the commissioner of the property tax that his income amounted only to £350. per annum. The Master of the Rolls ordered a dissolution of the partnership, and that the defendant should repay the plaintiff half the premium he had paid: Held, that sufficient misrepresentation had been proved to uphold the decree of the court below. *Jauncey v. Knowles*, 1 Law Tim. Rep. N. S. 117.

**PUBLIC COMPANY.**—*Contributory—Transfer to avoid liability.*—It is well established (see *exp. De Pass*, 7 W. R. 682; re *Jessop*, 2 De G. & S. 638; 6 W. R. 716), that if a shareholder in a joint stock company parts out and out with all his interest in his shares, although in prospect of a winding-up order and with the express purpose of getting rid of the liability, and although he knows the shares are of no value, and although he knows the transferee to be a man of straw, he is absolved from liability, and cannot be placed on the list of contributories on any subsequent winding-up. The Lord Chancellor has stated, that he should have hesitated before he concurred in these decisions, thinking that there was a considerable difference to be drawn between the analogy of an assignee of a lease assigning the

lease to a man of straw and a shareholder who has become a partner with others, and has incurred a joint liability at a time when the property had ceased to be of any value, and his sole object being to throw the liability entirely on his co-partners. The following decision shows that these cases will not be acted on, unless the shareholder has parted with all interest in and control over the shares. In a company, the shares of which passed by delivery, a shareholder, desiring to get rid of his liability, sold his shares to a warehouseman of his own, a few days before the order was made for winding-up the company. The market price of the day (which was only a nominal sum) was professed to be paid, but even that sum came out of moneys held by the transferree in trust for the shareholder: Held, that this was not a bona fide transfer, and the shareholder's name was placed on the list of contributories. *Exp. Hyam*, 8 W. R. 52.

**SOLICITOR AND CLIENT.**—*Mortgage—Restriction upon redemption for a period of twenty years.*—The following case shows how strict courts of equity are in respect to dealings between a solicitor and his client, where the latter has not a separate solicitor to advise him. It appeared that by a deed of mortgage entered into between a solicitor and his client, it was stipulated that the debt should remain on the security of the hereditaments for twenty years, and the client covenanted that he would not pay or tender payment of the sum, or institute proceedings for the redemption of the lands for that period. There was a power of sale which was not to be exercised until the expiration of the twenty years, or until two months' default should have been made in the payment of interest. Upon a bill to redeem being filed within four years after the date of the deed, redemption was decreed, it being held, as between solicitor and client, that where the former takes a security from the latter, the court will not allow the solicitor to enforce a stipulation of an unusual kind and disadvantageous to the client. *Cowday v. Day*, 1 Law Tim. Rep. N. S. 88.

**STOCK.**—*Re-transfer of a sum of stock from the names of the National Debt Commissioners to the legal owner.*—The petitioner's mother, during his infancy, had purchased a sum of money, in the joint names of herself, himself, and a third person, H. The mother or H. received the dividends until her death in 1821; afterwards H. received them till his death in 1838, since then no dividends had been received, and the sum was transferred into the names of the National Debt Commissioners: Held, that inasmuch as the evidence showed the legal title to be clearly in the petitioner, and there was nothing to show a beneficial interest in anybody else, the court would not disturb the equitable right of the petitioner, and re-transfer of the fund to him ordered accordingly. *Ex parte Bouts*, 34 Law Tim. Rep. 27.

**TENANT FOR LIFE.**—*Charge—Payment of interest by tenant for life—Insufficiency of rents to pay interest.*—If a tenant for life remains in possession of the estate subject to a charge, receives the rents and profits and regularly pays the interest on the charge during his life, and gives no intimation that the rents are insufficient to pay the interest, or that he intended the excess above such rents to be a charge, his personal representatives will not after

his death be heard to say, that the estate remains charged with the deficiency between the rents and interest. His conduct amounted to a declaration either that the rents were sufficient to pay the interest, or that he did not mean to charge the inheritance with the deficiency. And it makes no difference that the tenant for life voluntarily entered into a personal covenant to pay the interest on such charge. So held by Lord Campbell, L. C. Brougham and Chelmsford: *contra* by Lords Cranworth and Wensleydale. *Lord Kensington v. Bouverie*, 34 Law Tim. Rep. 16.

**TOLLS.**—*Corporation—Receiver—Jurisdiction.*—When an act of Parliament authorises a mortgage to be made of a public undertaking, it necessarily authorises that the mortgagee shall have, as incidental to his character of mortgagee, all proper and appropriate remedies which belong to that peculiar character as against the mortgagor, and there is, especially in the case of tolls, whatever they may be, the power of appointing a receiver. A corporation, by act of Parliament, was authorised to raise money by debentures upon the tolls, rents, and stallages of the borough markets. The interest upon these debentures was allowed to fall into arrear: Held, that the court could grant a receiver of the tolls, but that it had no jurisdiction to interfere with the corporation in the letting or management of the stalls, &c., in the market-place. *De Winton v. The Mayor, &c., of Brecon*, 28 Law Journ. Rep. Ch. 598.

**TRUSTEES.**—*New—Stock—Vesting order in trustee—Trustee Acts, 1850, and 1852.*—By sec. 35 of the 13 & 14 V. c. 60, the court, on making any order for appointing new trustees, may, either then or subsequently, vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends, &c., in the person or persons who, upon the appointment, shall be the trustee or trustees. By s. 43, such order may be made either upon the hearing of a cause, or of any petition or motion. By s. 4 of the 15 & 16 V. c. 55, on neglect to transfer or receive the dividends of stock for twenty-eight days, an order may be made vesting the right to transfer or receive the dividends in such person as the court shall appoint. Where an order has been made, on petition, directing trustees appointed by the court to transfer stock standing in their name to new trustees, and one of such old trustees refuses, for twenty-eight days, to obey the order, the court will, on motion, vest the right to transfer the stock in the new trustees. *Re Holbrook*, 8 Week. Rep. 3.

**TRUSTEES.**—*Real estate—Direction to sell—Breach of trust by delaying to convert.*—In the case of *Buxton v. Buxton* (1 Myl. & Cr. 80), Lord Cottenham lays down a rule, without any qualification, as to the nature of the property at the time of sale, that, in the direction to convert with all convenient speed, an executor was entitled to exercise a discretion, and was not bound to proceed to an immediate sale, and points out the inconvenience that would happen if the rule was otherwise. Lord Cottenham also stated, "that there was no case in which an executor had been called upon to bear a loss which had arisen, because, in the bona fide exercise of a reasonable discretion, the conclusion he had come to had turned out



unfortunately." In the following case, it appeared that the testator devised a public-house to A. and B. as trustees, upon trust, as soon as convenient after his death, to sell the same, invest the proceeds, and pay the income to C. for life, and divide the capital after the death of C. as therein mentioned. The testator died in 1834. In 1836, the property was advertised for sale, and soon after, an offer was made of £900 for it. The trustees having been advised that the property was worth £1000, did not accept of this offer. Shortly afterwards, the property became depreciated in value from the scheme of a railway. A. died in 1842. C., the tenant for life, died in 1842. B. died in 1856. The property was unsold. In a suit instituted in 1856, for the administration of the testator's estate: Held, that the property must be sold, and that the estates of A. and B. should be held liable for the difference between the purchase money and the rents from 1842, and £900 and interest at £4 per cent. from 1842. *Fry v. Fry*, 28 Law Journ. Rep. Ch. 591.

**TRUSTEES.**—*Lunacy Regulation Act of 1853, ss. 137, 138—Appointment of new trustees—Form of order.*—By s. 137 of the above act, where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, &c., and it appears to the Lord Chancellor to be expedient that the power should be exercised or the consent given, the committee of the estate, under an order, may exercise the power or give the consent, in such manner as the order shall direct. In the following case, a power for the appointment of new trustees, contained in a settlement, became vested in a person who had been found lunatic by inquisition. The committee of the person and estate petitioned, under the above-named act (16 & 17 V. c. 70), for leave to exercise the power for him, and the same was ordered. *In re Bowmer*, 28 Law Journ. Rep. Ch. 618.

**TRUSTEES.**—*Trustees' Relief Act—Costs of paying money into court without inquiries* [2 L. C. 373; 4 Id. 211].—The following decision may be added to those noticed 4 L. C. 86, 211, inflicting on trustees wantonly paying money into court, under the Trustees' Relief Acts, the costs thereby occasioned. A trustee paid money into court under the Trustees' Relief Acts, without making inquiries for the parties entitled to the fund: Held, that he must pay the costs which the cestuis que trust, who were officers in the Austrian service, had been put to in obtaining payment of the money out of court. *In re Knight's trusts*, 28 Law Journ. Rep. Ch. 625.

**WILL.**—*Construction—Precatory trusts* [1 L. C. 22]—*Failure of particular trust—Residuary bequest—"Other"*—1 V. c. 26, s. 27—*Feme covert.*—We have before noticed the subject of precatory trusts (1 L. C. 22, 23), and the following case may be added to that reference. The 27th section of the 1 V. c. 26, presently referred to, enacts that a general gift shall include estates over which the testator has a general power of appointment. The reader will bear in mind that the 7th section of that act provides that no will of a feme covert shall be valid, except such a will as might have been made by a married woman before the passing of the act. In order to

raise a trust by precatory words in a will, there must be a certain subject matter and a certain object; but it is not necessary that the object should be so defined that it can be distinctly ascertained if there is a definite object intended, that is, a sufficient creation of a trust to exclude the legatee from taking beneficially. Thus, where a testatrix bequeathed to her husband absolutely a specific sum of £13,000, and requested that after reserving to his own absolute use and benefit £2,000, he would make such disposition of the remainder as he might deem most desirable to carry out her wishes, often expressed to him by word, and it appeared that she had never expressed any wishes on the subject, it was held that there was a definite object intended, and though that object could not be ascertained there was a sufficient creation of a trust to exclude the husband from taking the beneficial interest in the remainder of the fund, although the trust itself failed. Under the 27th section of the Wills Act, a general bequest by a married woman will include property over which she has a power of appointment. A bequest of "all and singular other my property and estate," will include not only everything not before mentioned in the will, but everything the previous disposition of which fails, unless it appears from the will that the property comprised in the previous disposition was intended to be excepted for all purposes from the residuary bequest, and not merely for the purpose of giving it to the particular legatee. *Bernard v. Minshull*, 28 Law Journ. Rep. Ch. 649.

## COMMON LAW.

**ASSIGNMENT.**—*Of personalty—Future acquired property—Chattels—Crops*—[F. Bk. p. 206; 2 L. C. 185, 188, 333].—When on the face of an assignment of personalty it is plain that it was intended to operate as a continuing security, and to apply to property afterwards acquired, and substituted for that which was originally assigned, it will, if the words are capable of such a construction, be so applied. And where in such a case the deed was found capable of such a construction, although rather in the indirect form of a power of attorney than in the way of direct conveyance, it was construed to extend to stock and growing crops on a farm not occupied by the assignor at the time of the execution of the deed. *Carr v. Allatt*, 27 Law Journ. Rep. C. P. 385.

**ATTORNEY AND CLIENT.**—*Trustee and cestui que trust—Costs.*—It has been decided in equity that where a solicitor is a trustee, and he acts in the execution of the trusts, and does business which it is proper for a solicitor to do, he is entitled to costs out of pocket only (1 L. C. 331, 332; 4 L. C. 50). In the following case the question was raised at common law, and where the business appears to have been done on the request of a cestui que trust. The marginal note is as follows: *Quære*, whether a trustee, an attorney, is entitled to charge his cestui que trust for business in connection with the trust done at the request of the cestui que trust and for his advantage, anything more than costs out of pocket. 'This being *res integra*,

the court will not decide the question upon a summary application to review the master's taxation, but will leave it to be decided by an action. *Re Overbury & Peake*, 1 Law Tim. Rep. N. S. 103.

**BILL OF EXCHANGE.**—*Liability of acceptor on cancelled bill—Forgery—Lost cheque or bill.*—It is settled that if a party draw a cheque, and before issuing it loses it, or it is stolen from him, and it afterwards finds its way into the hands of a holder for value without notice, who sues upon it, the defendant, the drawer of the cheque, has no answer to the action. The same is the case where the party has indorsed in blank a bill payable to his order, which is lost or stolen before being delivered to the indorsee (*Marston v. Allen*, 8 M. & W. 494; 11 L. J. Ex. 122). Where a maker of a negotiable instrument does some act *animo cancellandi*, but so imperfectly that his intention is not manifest on the face of the instrument, and it is afterwards put in circulation, he is responsible to a bona fide owner for value, though the instrument be put in circulation without his authority. Therefore, where the acceptor of an accommodation bill of exchange intrusted it to the drawer for the purpose of getting it discounted, and on the latter failing to do so tore it in half and threw away the pieces in the street, but the drawer picked them up and put them in his pocket, saying that they would be safer there, and afterwards pasted them together and wrongfully negotiated the bill, there being nothing in the appearance of the bill to excite suspicion: Held, that the acceptor was liable on the bill to a holder for value without notice. *Seem*, that the pasting the two portions of the bill together under the above circumstances did not amount to forgery. *Ingham v. Primrose*, 28 Law Journ. Rep. C. P. 294.

**BILL OF EXCHANGE.**—*Indorsement in blank, effect of—Action by agent of indorsee.*—"An indorsement of a bill requires that there shall be a delivery of the bill with an intent to make the person to whom it is indorsed owner of the bill, a party to the bill and transferree of the property in it" (per Lord Denman in *Lloyd v. Howard*, 15 Q. B. 995). But if an indorsement be made to one in blank, he has a right to hand the bill over to any person, who, though merely an agent for such deliveror, may sue thereon; at least so it was held in the following case, where the drawer of a bill of exchange indorsed it in blank and handed it over to the manager of a company for the company, and the court decided that such manager might, with the authority of the company, sue on it in his own name, and declare on it as having been indorsed to him by the drawer, for, per Williams, J., "the indorsement being in blank, the company could constitute any person they pleased the holder," or, per Byles, J., "it was competent to the principal to hand it over to the agent to sue upon." *Law v. Parnell*, 8 W. R. 6.

**BILLS OF SALE.**—*Description of assignor or attesting witness—Occupation—Surgeon—Evidence—Office copy of affidavit filed.*—There must be a sufficient description of every attesting witness to a bill of sale under the Bills of Sales Act, 19 & 20 V. c. 36, as well as of the assignor. But, though where a person has any fixed profession or business, or avocation by which

he gains his living, it must be mentioned in such description, it is not necessary to insert a description of an occupation which he has only casually and temporarily followed. And where the assignor was a medical student who had for some short time acted as surgeon's assistant, but for six months before action had been in no business: Held, that he was sufficiently described as "gentleman." An objection that the attesting witness was not duly described, not having been made at the trial, was not allowed to be urged. An office copy of the affidavit admitted as good and sufficient evidence. *Bath v. Sutton*, 27 Law Journ. Rep. Ex. 388.

**COPYRIGHT.**—*Musical composition—Dramatic piece*—3 & 4 Will. 4, c. 15—5 & 6 Will. 4, c. 45.—In the case of *Harfield v. Nicholson* (2 Law Journ. O. S. 90, 102; 2 Sim. & St. 1), which was a case on the statute of Anne, Sir John Leach says, "I am of opinion, that under that statute (8 Anne, c. 19), the person who forms the plan and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements, that he, the person who so forms the plan and scheme for the work, and pays different artists of his own selection, who, upon certain conditions, contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally." In *Shepherd v. Conquest* (17 C. B. 427; 7 W. R. 288), Jervis, C. J. said, "We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work or the right of representation can become vested, ab initio, in an employer other than the person who has actually composed or adapted a literary work. It is enough to say, in the present case, that no such effect can be produced where the employer merely suggests the subject and has no share or design in the execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed. It appears to us an abuse of terms to say that in such a case the employer is the author of the work to which his mind has not contributed an idea, and it is upon the author in the first instance that the right is conferred by the statute which creates it." The following is a decision in a case falling within that class of cases as to which the court, in *Shepherd v. Conquest*, abstained from offering any opinion. The defendant, with the aid of scenery, dresses, and music, adapted one of Shakspear's plays to the stage; the general design of the representation being formed by the defendant, who employed the plaintiff for reward paid to him by the defendant to compose, and the plaintiff did compose, as part of the representation, and as an accessory to the dramatic piece, a musical composition, which formed part of the dramatic piece, on terms that the defendant should have the sole liberty of representing, and permitted to be represented, the said musical composition, with the dramatic piece or part thereof: Held, that the defendant had the sole right of representing the entire dramatic piece, including the plaintiff's musical composition, and that he violated no right of the plaintiff within the

3 & 4 W. 4, c. 15, and the 5 & 6 V. c. 45, by representing, without the plaintiff's consent in writing, the entire dramatic piece, including the plaintiff's musical composition. *Hatton v. Kean*, 7 Week. Rep. 7.

**CORPORATION.—Wrongful act by—Malice—Action** (F. Bk. 97)—*Pleadings*.—An action will lie against an incorporated public company for an injury wrongfully committed where the act done is within the purpose for which the company was incorporated. The declaration charged that the plaintiff was a carrier of passengers in certain public streets, roads, and highways, by means of omnibuses driven and conducted by plaintiff's servants, which omnibuses had full right and liberty to run respectively from, &c., to, &c., to stop for a reasonable time for taking up and setting down passengers, and were permitted, by the police regulations, to wait a certain space of time at stated places to look for passengers, yet the defendants, well knowing the premises, but contriving and intending to injure, impoverish, and ruin the plaintiff, and to prevent him from carrying on his said business at divers times, wrongfully, vexatiously, and maliciously, placed and drove on the public streets certain other omnibuses and carriages just before and behind the said omnibuses of the plaintiff, whilst the same were plying for passengers in such a manner as to hinder and prevent, frighten and deter, passengers from entering the plaintiff's omnibuses as they arrive, might and would have done, and so as to hinder and prevent the plaintiff from having the free use of the highway and so as greatly to obstruct and incumber the said highway, to the nuisance of the Queen's subjects, &c. It then alleged that the defendants wrongfully, &c., drove and placed certain other carriages and omnibuses upon and against the omnibuses and horses of the plaintiff, &c., upon and against the servants of the plaintiff then conducting the same, &c., in such a manner as to injure, bruise, and damage the omnibuses and horses of the plaintiff, and to prevent the doors of plaintiff's omnibuses from being opened, and to obstruct and block up the access of passengers to plaintiff's omnibuses and to hinder and disable the servants from freely performing their duties, and further that the defendants directed their servants to, and their servants did, insult, hiss, assault, beat, and illtreat the plaintiff's servants in the said public streets whilst conducting the plaintiff's omnibuses. It then charged the defendants with so obstructing the thoroughfares at certain points where, by the police regulations, omnibuses are permitted to wait for passengers, as to induce and oblige the police there stationed to order the plaintiff's omnibuses from the said points and places, &c., and thus to deprive them of passengers, and that the defendants caused one or more of their omnibuses to precede and follow each omnibus of the plaintiff's in such a manner as to cause such an obstruction in the thoroughfare as would induce the police to order the plaintiff's omnibuses away, and the plaintiff's omnibuses and horses were greatly broken, injured, and destroyed, and the plaintiff otherwise injured and damaged, &c.: Held, on demurrer, that the declaration disclosed a good cause of action. *Green v. The London General Omnibus Company*, 1 Law Tim. Rep. N. S. 95.

**GIFT.**—*Specialty—Chose in action—Debentures—Title—Transfer.*—A gift of a specialty may be good in law, although there is no legal transfer of the debt or property of which it is the security. In *detinue* by executors for railway debentures, which the defendant alleged to have been given to her by the testator, although no legal transfer had been executed, the jury having found that he had given her the debentures, a verdict entered for the defendant was sustained. *Barton v. Gainer*, 27 Law Journ. Rep. Ex. 390).

**LEGACY.**—*Assent to* [3 L. C. 321 ; 2 Id. 67, 86]—*Ejectment—Leasehold—Executors' assent—Evidence.*—The doctrine that slight evidence is sufficient of the assent of executors to a bequest, or that it may be implied, only applies in ordinary cases, where the assent would be rightful, and not where it must be implied against their own acts. And where the bequest to the defendant was by a husband of leasehold property, devised to his deceased wife for her separate use, and which she had bequeathed to the plaintiff, and the husband's executors joined with the devisee of the wife in suing: Held, that even supposing that the husband's assent was necessary to the validity of the wife's will, the assent of the executors to the bequest by him to the defendant required to be proved by express evidence, and was not to be presumed or implied opposed to their own act in suing. *Tudor v. Guest*, 27 Law Journ. Rep. Ex. 395

**LIMITATIONS, STATUTE OF.**—*Acknowledgment taking case out of statute—Difference whether debt barred or not.*—Where a promise to pay a debt barred by the Statute of Limitations is conditional, the performance of the condition must be shown (*Tanner v. Smart*, 6 B. & C. 603). In other cases there is a difference in the effect of language referring to an existing debt upon which the debtor might, at the moment, be sued, and a debt the remedy for which the statute has barred. The following words, in a letter written by a debtor to his creditor, in answer to an application for the debt, before the statute had barred the remedy, were held to take the case out of the Statute of Limitations: "In reply to your statement of account, I am ashamed it should have stood so long. I must beg to trespass further on your kindness till a turn of trade takes place, as trade continues very dull." *Cornforth v. Smithurst*, 8 W. R. 8.

**MORTGAGE.**—*Tenant to mortgagor—Assignment—Use and occupation—Mortgagor and mortgagee.*—Where the mortgagor lets the lands mortgaged to a tenant, a mere notice from the mortgagee to the tenant to pay his rent to the mortgagee, will not be an answer to the mortgagor's claim for the rent; but payment to the mortgagee would (*Standen v. Christmas*, 10 Q. B. 135; 16 L. J. Q. B. 265). The assignee of a mortgagor who has let a tenant into possession after the mortgage, can sue such tenant for use and occupation, notwithstanding notice from the mortgagee to pay rent. A mortgagor in possession had agreed to grant a lease to the defendant with the privity of the mortgagees, who, however, were no parties to the agreement; the defendant was let into possession under the agreement, and paid rent to the mortgagor. The mortgagor then assigned to the plaintiff, who

sued the defendant after notice to him from the mortgagees to pay them the rent for use and occupation: Held, that the action was maintainable. *Hickman v. Mackin*, 28 Law Journ. Rep. Ex. 310.

**MASTER AND SERVANT.**—*Negligence of one servant causing injury to another* [F. Bk. 104].—It has now been settled by all the courts in Westminster Hall, that a master is not responsible for an injury sustained by a servant, from the mere negligence of a fellow-servant engaged in the same employment. The Court of Exchequer Chamber, in *Roberts v. Smith*, has decided that it is the master's duty, where he personally interferes, to take care to provide that the tackle and apparatus employed by him is proper and secure, and that he is liable for damages caused by the want of due care in this respect. The same principle was laid down as existing in the law of Scotland. Where the plaintiff was, with other workmen, in the employ of the defendant, engaged in sinking a mine, and was at the bottom of the pit, and assisted in filling a tub with water which was drawn up to the top to be emptied, and through something occurring at the top, where his fellow-workmen were employed to empty it, it fell down upon the plaintiff and injured him: Held, that he could not sue the defendant for the injury. *Griffiths v. Gidlow*, 27 Law Journ. Rep. Ex. 405.

**SHERIFF.**—*Action for false return—Showing damage—Distress for larger amount than value of goods.*—According to the older authorities, the sheriff is bound by his return that he has seized goods on a *fi. fa.* to a certain value, he having been considered as charging himself with the value he had returned (2 W. Saund. 47, a. 343). And according to an obiter dictum of Lord Campbell, in *Remmett v. Lawrence* (15 Q. B. 1010), the sheriff would be estopped if he said that he had seized the defendant's goods, and had them in his hands for want of buyers. However, since the passing of the statutes of Anne relating to returns, the doctrine has been qualified to this extent, that the sheriff in his return to a *venditioni exponas*, or in his defence to an action for not paying over the proceeds of the goods when sold, may rely on the statutes, and show that he has done no more than his duty under the statutes, in paying over the whole proceeds to the landlord. In the following case it was held, that to sustain an action against a sheriff for false returns to writs of *fi. fa.* and *venditioni exponas*, damage to the plaintiff must be shown. It appeared that the plaintiff sued out a writ of *fi. fa.* against the goods of one Mason, and delivered the same to the sheriff. The sheriff seized goods, and on the 7th January, 1859, returned that he had seized goods to the value of £20, which remained in his hands for want of buyers. An hour and a half before that return was made the goods had been sold for £35 10s. The plaintiff, on the 8th, issued a writ of *venditioni exponas*, to which the sheriff returned that he had sold for £35 10s., and had expended the whole of that sum in making certain payments which he set out. These payments he had a right to make, with the exception of one item of £3 5s. which he had no right to make. Before the sale of the goods a distress for rent was put in for a larger sum than the goods were sold for. In an action brought against the sheriff for a false return to the

writs of *fi. fa.* and *venditioni exponas* : Held, that a larger sum being due for rent than the goods realised, and no damage having been shown to have been sustained by the plaintiff by reason of the false return, he could maintain no action against the sheriff. *Levy v. Hale*, 1 Law Tim. Rep. N. S. 132.

**SHIPPING.**—*Freight—Parties entitled to freight when cargo carried on in another vessel after abandonment.*—Where an insured ship finishes her voyage with the cargo on board, it is the ship of the underwriter, and those who make use of it are held to do so for the benefit of its then owners ; but when another ship finishes the voyage, it is not the underwriter's ; and there is no reason why those who have it should be supposed to be acting for the benefit of the underwriters, but rather that they are acting for their own employers, namely, the former owners. It has accordingly been decided that when, on the abandonment of a ship on a voyage, the cargo is taken to its destination in another vessel hired by the captain, the underwriters of the ship are not entitled to the freight due on the delivery of the cargo. *Hickie v. Rodocanachi*, 28 Law Journ. Rep. Ex. 278.

**TENANTS IN COMMON.**—*Ejectment by tenants in common—Common Law Procedure Act, 1852 (15 & 16 V. c. 76, ss. 169, 180).*—Tenants in common can recover in ejectment under the C. L. P. Act, 1852, in a joint writ, the whole of the property to which they are entitled in common. *Elliss v. Elliss*, 27 Law Journ. Rep. Q. B. 316.

#### COMMON LAW PRACTICE.

**AWARD.**—*Setting aside—Time for moving—9 & 10 W. 3, c. 15.*—By the 9 & 10 W. 3, c. 15, an application must be made to set aside an award before the last day of the term next after such arbitration made and published to the parties. This statute still applies to all cases within it, notwithstanding the C. L. P. Act, 1854, s. 9, which mentions the first seven days of the ensuing term in cases of compulsory references. In the following case it was held that in case of a submission to arbitration, made in a pending cause by consent of parties, under which an award had been made and published, the 9 & 10 W. 3, c. 15, prevents an application to set the award aside being effectual, unless made before the last day of the term next following such publication. Therefore, where a rule nisi to set aside the award had been moved for on the 18th November, and granted only on condition that the submission (which was in the hands of the defendant) were made a rule of court before the last day of term (the 25th), the court, on the 24th (the submission not having been obtained from the defendant, and there being no affidavit of his refusal to give it up), refused a motion to enlarge the rule. *Dodd v. Platt*, 1 Law Tim. Rep. N. S. 135.

**CONSOLIDATION OF ACTIONS.**—*Several actions brought by an attorney upon separate bills of costs.*—Where an attorney did different kinds of professional work for a client, and after all the business was transacted, sent in a bill for one part of the business, and subsequently sent in a bill for the other part, and commenced an action for the first part of the business



before the expiration of the month in respect of the delivery of the second bill, and after the expiration of that month commenced an action for the other part, the Court of Queen's Bench (dissentiente Erle, J.), made an order for the consolidation of the two actions. *Beardsall v. Cheetham* 27 Law Journ. Rep. Q. B. 367.

**GARNISHMENT** [F. Bk. 278; 1 L. C. 160, 161].—*Attachment order*—17 & 18 V. c. 125, s. 61—*Debt owing or accruing—Verdict* [see 3 L. C. 158, 325, 379; 4 Id. 87, 198, 419; 5 Id. 63, 136].—A sum for which a person obtains a verdict in an action on a marine policy of insurance is not a debt "arising or accruing to such person" which can be attached under the C. L. P. Act, 1854, s. 61, until judgment has been signed in such action. Where, therefore, one judgment creditor of such person had, under the act, obtained an order to attach between the verdict and judgment, and another such judgment creditor had obtained a similar order after the judgment, the last order alone was allowed to take effect. *Dresser v. Johns*, 28 Law Journ. Rep. C. P. 281.

**SHERIFF**.—*Return of writ—Liability to attachment six months after retiring from office*.—A rule to compel the sheriff, six months after his retirement from office, to return a writ, is not a nullity; and if time is obtained on his behalf to return the writ, the relief conferred by the statute is waived, and the sheriff will be liable to attachment on default. *Walker v. Davies*, 27 Law Journ. Rep. Ex. 387.

#### PROBATE AND DIVORCE.

**ADMINISTRATION**.—*Practice—Jurisdiction of Court of Probate—Affidavit that deceased left property in this country*.—The Court of Probate having, as a general rule, no jurisdiction to grant letters of administration, unless the deceased leaves personal property in this country, where administration to the estate of a person who died resident abroad is applied for, it should appear upon affidavit that he left personal property in this country. Where A., the person primarily entitled to letters of administration, is abroad, and a citation has issued, but has not been personally served, calling on him to accept or refuse letters of administration, and show cause why they should not be granted to B., who, in the event of A.'s refusing to accept administration, would be entitled to them, the court, before granting administration to B., requires an affidavit that A. has no agent in this country. *Evans v. Burrell*, 28 Law Journ. Rep. P. C. 82.

**WILL**.—*Competency—Insane delusion*.—We have, elsewhere (F. Bk. 188, 189; 4 L. C. 123, 251), alluded to a decision to the effect that a party propounding a will is bound to show that it was executed by a person of a sound and disposing mind, on the principle that the will displaces the title of the heir; and the same applies to personalty as to next-of-kin (F. Bk. 277; 1 Jur. N. S. 171). The following decision seems somewhat to modify this rule, but the previous cases were not referred to, it being held by Sir C. Cresswell, that if a will, rational on the face of it, is shown to have

been executed and attested in the manner prescribed by law, it is presumed in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances in evidence which counterbalance that presumption, the decree of the Court of Probate must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it. *Symes v. Green*, 28 Law Journ. Rep. P. C. 83.

#### BANKRUPTCY.

**\* ALLOWANCE TO BANKRUPT.**—*Joint and separate proofs*—B. L. C. Act, 1849, ss. 195, 196—*Class of certificate affects the amount.*—By s. 195 of the B. L. C. Act, 1849, every bankrupt who shall have obtained his certificate, if his estate paid 10s. in the pound, shall be allowed and paid £5 per cent. out of such produce, but so as not to exceed £400; but the court may reduce any allowance if a first-class certificate were not granted. By s. 196, under a joint petition, any partner who shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate and upon the separate estate of such partner, shall be entitled to his allowance, although the other partner may not be entitled to any allowance. In considering the amount to be paid to a bankrupt under the 195th section of the Bankruptcy Act, 1849, the court will have regard to the class of certificate which he has obtained, and will not award the whole amount permitted by the statute, if a second-class certificate be obtained. *Semble*, the court will, where only one creditor has proved against the separate estate of any bankrupt, allow such proof to be expunged by consent, in order to enable the bankrupt to obtain his statutory allowance under the 195th section. *Ex parte Hillstead*, 1 Law Tim. Rep. N. S. 136.

**ARRANGEMENTS.**—*Petition for arrangement followed by bankruptcy*—*Carriage of proceedings to choice.*—Where a petition for arrangement, presented under the arrangement clauses of the Bankruptcy Act, 1849, is adjourned into the public court under sec. 233, and the debtor declared bankrupt, he will be entitled to the conduct of the proceedings down to the choice of assignees in analogy with the practice under an adjudication of bankruptcy proceeding upon the bankrupt's own petition. *Re Snooke*, 34 Law Tim. Rep. 16.

**EXAMINATION AFTER DISCHARGE.**—*Jurisdiction of the court for relief of insolvent debtors, and the county courts as to the further examination of an insolvent after his discharge*—1 & 2 V. c. 110, s. 98.—Where the estate of a discharged insolvent may not be sufficiently described or discovered in the schedule, or where his assistance is necessary to adjust, make out, recover, or manage his affairs, the assignee may apply to the court that such insolvent shall be again examined touching his estate and effects. The Insolvent Debtors' Court has no power further to examine an insolvent whose case has been referred for hearing to any county court under the 10 & 11 V. c. 102, s. 10, or to interfere with the court of reference in

regard to such examination by it. If the court of reference requires the schedule for such a purpose, it will be again transmitted to that court. *Re Parrott*, 1 Law Tim. Rep. N. S. 111.

**OPENING PETITION.**—*Time for enlarging—Jurisdiction to stop sale of bankrupt's effects.*—The B. L. C. Act, 1849, ss. 96, 101, gives the petitioning creditor three days to open the petition in; during these three days he has the right exclusively; after that, there are eleven days more during which any creditor, including the petitioning creditor, may open the petition; so that the petitioning creditor has three days exclusively, and eleven days more along with others, altogether fourteen days to open it. A petitioning creditor is not justified in petitioning till he is prepared to prove the bankruptcy. The 96th section of the Bankrupt Act, which enables the court to extend the time for opening the petition, was to enable the court so to do where the petitioning creditor is doing his best to procure an adjudication, but is thwarted by unexpected obstacles. And it has been laid down by Mr. Commissioner Ayrton, that the time for opening a petition should not be enlarged under sec. 96, as a matter of course, but only when good cause is shown. When the petitioning creditor files a petition for adjudication, in order to gain time to sell under a bill of sale, the court of bankruptcy, after adjudication on the petition of another creditor, has jurisdiction to stop the sale by injunction. *Re Hickson*, 1 Law Tim. Rep. N. S. 198.

**PROPERTY OF INSOLVENT.**—*Discretion in court as to the disposal of property in certain cases—Property may be mortgaged if more beneficial.*—The insolvency court has a discretionary power as to the disposal of annuities for the lives of insolvents or other uncertain interests, or reversionary or contingent interests or property, under circumstances where the immediate sale thereof might be prejudicial to the estate (1 & 2 V. c. 110, s. 48). Where an insolvent is entitled to a compensation allowance under the recent Probate Act, upon which there were several mortgages with powers of sale: Held, that the court will aid the assignees by authorising such steps as may be necessary for dealing with the property in such a manner as will be most beneficial for the general body of creditors. *Re John Wills*, 34 Law Tim. Rep. 31.

**REPUTED OWNERSHIP.**—*Order and disposition—Bankrupt Law Consolidation Act (12 & 13 V. c. 106, s. 125)—Effect of alteration of deed.*—In *Freshney v. Carrick or Wells* (1 H. & M. 653; 26 L. J. Ex. 129) a trader assigned his goods by way of mortgage, subject to a proviso that it should be lawful for him to make use of the goods until default in payment of the money secured by the mortgage. The mortgagee allowed the trader to continue in possession of the goods until his bankruptcy, and the court held, that the goods passed to the assignees, as being in the order and disposition of the bankrupt with the consent of the true owner. In the following case it appeared, that, by a bill of sale, A., a trader, assigned all his personal estate, consisting of furniture, stock in trade, &c., to the defendant, by way of mortgage, to secure past and future advances. The deed con-

tained a proviso, that until non-payment, after a written demand, A. should continue in possession. The property, by the consent of A. and the defendant, was subsequently offered for sale by public auction at A.'s house, but no sale was effected, and A. continued in possession. On the 22nd of June he executed an assignment of all his property for the benefit of his creditors to trustees, who took possession. On the following day the defendant made a written demand of his debt in the terms of the bill of sale. In consequence of this, with the consent of the trustees, the deed of assignment was altered by the introduction of a trust clause for payment of the defendant's claim before the other creditors, and A. re-executed the deed. The defendant afterwards took forcible possession of the goods, and on the 27th of June A. was adjudicated a bankrupt. In an action by A.'s assignees to recover the goods: Held, that the deed of assignment, notwithstanding the alteration, operated as an act of bankruptcy on the 22nd of June, and that at that time the goods were in the order and disposition of the bankrupt, with the consent and permission of the true owners within sec. 125 of the Bankrupt Law Consolidation Act, 12 & 13 V. c. 112. *Reynolds v. Hall*, 28 Law Journ. Rep. Ex. 257.

**RESCINDING FINAL ORDER.**—*Final order obtained without disclosing an interest to property.*—After the final order, any assignee or creditor may give one month's notice to a petitioner, either by personal service, or, if he cannot be found, by service at the place of his residence mentioned in his petition, that he intends to apply by motion to the commissioner, or to the commissioner appointed to succeed him, as the case may be, that the final order be rescinded; and should the court see reason to believe that the petitioner had not, before the making of the final order, made a full disclosure of his estate, effects, and debts, it will rescind the final order. *Re Gillingham*, 1 Law Tim. Rep. N. S. 110.

**TRADING.**—*Publication and sale of a single work by the author.*—Held, that the publication and sale by an author of a single work, apart from a general intention of printing and publishing, do not constitute the trading within the meaning of the bankrupt laws. *Re Hare*, 34 Law Tim. Rep. 15.

**TRADER PETITIONING.**—*Petition by trader for adjudication against himself—Must show £150—When—Prosecution of by creditor.*—By the Consolidation Act, s. 93, any trader liable to become a bankrupt may present a petition for adjudication of bankruptcy against himself, provided, always, that unless such trader shall forthwith after the filing of his petition, and before adjudication, make it appear to the satisfaction of the court that his available estate is sufficient to pay his creditors (by 17 & 18 V. c. 119, s. 20; 1 L. C. 153) £150 at the least, clear of all charges, &c., such petition shall be dismissed. It has been held, that a trader, presenting a petition for adjudication of bankruptcy against himself, under the 93rd section of the Bankruptcy Act, 1849, must "forthwith" show assets to the amount or value of £150; and if he fail to do so, any creditor whose debt is of the requisite amount may, at the same meeting, proceed with, and prosecute the petition to an adjudication. *Re Allen*, 1 Law Tim. Rep. N. S. 135.

## COUNTY COURTS.

**COSTS.**—9 & 10 V. c. 95, ss. 128, 129—*Costs between attorney and client on nonsuit of plaintiff.*—By the 9 & 10 V. c. 95, s. 128, actions where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, &c., may be brought in the superior courts. The 9 & 10 V. c. 95, s. 129 (superseded where the plaintiff obtains a verdict by the 13 & 14 V. c. 61 ss. 11, 12), by which a defendant is entitled to costs as between attorney and client, where a verdict is not found for the plaintiff, excludes cases where the plaintiff dwells more than twenty miles from the defendant. *Mason v Tucker*, 28 Law Journ. Rep. Ex. 271.

**JURISDICTION.**—*Cause of action within—Order received and executed within jurisdiction, but sent beyond jurisdiction—Posting letter—Prohibition.*—By the 19 & 20 V. c. 108, s. 15, the registrar of the county court "may issue a summons against any defendant residing out of the jurisdiction of such court at any time, upon the application of any plaintiff who will depose before such registrar that his cause of action has arisen within the jurisdiction of the county court, in like manner as any judge of a county court may now issue such summons." The power of the county court judges is regulated by the 9 & 10 V. c. 95, s. 60, which permits the process to issue out of the court of the district in which the cause of action arose. By cause of action is meant the entire cause of action; that is the phraseology of the 41st of the rules framed under 19 & 20 V. c. 108. In the following case it appeared that the defendant, residing out of the jurisdiction, wrote and sent a letter giving an order to the plaintiff, which order was received and executed by the plaintiff entirely within the jurisdiction of the county court of L.; by the leave of the registrar, process was issued out of that court, and served upon the defendant out of the jurisdiction: Held, that, as the letter was no request until it reached its destination, the cause of action arose within the jurisdiction of the county court of L., and that the process was rightly issued. *Newcomb v. De Ros*, 7 W. R. 5.

## CRIMINAL LAW.

**GAME.**—*Information under 1 & 2 W. 4, c. 32, s. 30—Right of tenant to authorise servant to kill rabbits.*—In *Spicer v. Barnard* (28 L. J. M. C. 177) it was held, that the occupier of land may, by himself or servants, kill coney, notwithstanding that in his lease there is a reservation of game to the landlord, nothing being said about coney; but there the tenant hired a man to kill the coney, which is a different thing from allowing or directing a servant to do so. In the following case it appeared, that by a lease the landlord reserved to himself liberty to hawk, hunt, course, shoot, fish, & fowl upon the demised lands; and by agreement with H., a subsequent tenant, who held in all other particulars except the game on the same terms

as the lessee (his predecessor), the right to sport on the land was reserved to H. H. directed his servant to go on the land and shoot a rabbit, whereupon an information was laid against him by the landlord, which the justices, acting on the authority of *Spicer v. Barnard* (28 L. J. M. C. 177), dismissed: Held, that the justices were right, that the case came within the authority of *Spicer v. Barnard*, and, therefore, the information was properly dismissed. *Padwick v. King*, 1 Law Tim. Rep. N. S. 98.

**PAUPER.**—*Removal of pauper—Refusal by overseers to receive—Remedy in case of refusal.*—In case of overseers refusing to receive a pauper who has been removed under an order of justices, the proper remedy is by indictment, and the court will not grant a mandamus to compel the overseers to receive the pauper. *Ex parte The Overseers of Downton*, 27 Law Journ. Rep. M. C. 280.

**PAWNBROKER.**—*Non-liability of for damage by accidental fire*—39 & 40 G. 3, c. 99, s. 24.—A pawnbroker is not liable under sec. 24 of 39 & 40 G. 3, c. 99, for damage to pledges occasioned by an accidental fire, without proof of its having been caused by any default or neglect. *Syred v. Caruthers*, 27 Law Journ. Rep. M. C. 273.

**SUNDAY.**—*When reckoned, though the last day for doing an act—Nuisances Removal Act*—18 & 19 V. c. 121, s. 40—*Appeal—Recognisance—Computation of time.*—Where a statute mentions a certain number of days for doing any act, and the last day falls on a Sunday, the party has not the following day, Sunday, unless specially excepted, counting as one of the days, though the last day. A different rule, indeed, prevails in matters of procedure before the courts, but that is founded on a rule of the courts. The Nuisances Removal Act, by sec. 40, provides, that the appellant shall not be heard in support of the appeal unless within fourteen days after the making of the order appealed against he shall give notice of appeal, and shall, within two days of giving such notice, enter into a recognisance to try the appeal. Certain justices made an order under the above act on the 13th, which was served on the 24th. On the 26th, notice of appeal was given, and on Saturday the 27th, the appellant made unsuccessful efforts to find a justice to take the recognisance, and on his going on the following Monday, the justice refused to take it: Held, that the justice was right, that Sunday was to be considered as one of the two days allowed for entering into the recognisance after notice of appeal. *Reg. v. The Justices of Leicestershire*, 1 Law Tim. Rep. N. S. 92.

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## Vendors and Purchasers.

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**ASSIGNMENT.**—*Priority—Notice—Solicitor—Client—Notice to—Solicitor being a trustee—Antecedent knowledge of notice before being trustee.*—The following decision, by the Court of Appeal, as to the sufficiency of notice of an assignment of a chose in action, is one deserving of attention

(see F. Bk. 198; 2 L. C. 75—78, 324; 3 Id. 37, 153):—It appeared that B., being entitled to the reversion of a sum of money invested in the funds in the names of four trustees, sold his interest in 1820 to C. In 1824 he sold the same interest to D., who immediately served each of the four trustees with notice. In 1826 C. also served the trustees with notice, and stated that he had previously done so in 1820 through E., who was one of the trustees, and the solicitor of his co-trustees in this trust. It appeared, that in 1824, E., the solicitor, had retired from the trust, and his son, who was formerly his clerk, had been appointed in his place: Held (affirming the decision of the Master of the Rolls), that the first assignment was entitled to priority, as there had been sufficient notice of it. The court expressed no opinion on the question, whether notice to the solicitor, who was one of the trustees, was notice to all the trustees, or on the question, what was the effect of the antecedent knowledge of E.'s son, when he afterwards became trustee? On both these points, Turner, L. J., stated, in his judgment, that it must be distinctly understood he gave no opinion. *Re Durand's Trust*, 1 Law Tim. Rep. N. S. 84

**CHARGE OF DEBTS.**—*Implied power of sale—Exercise of power after great lapse of time.*—When penning our previous remarks on the difficulties of making a title under the charge of debts (1 L. C. N. S. 345—353) we had in view a pending case, which has since come on before the Master of the Rolls. We allude to *Sabin v. Heap* (1 Law Tim. Rep. N. S. 51—53), where it was held, that the executor of an executor (1 L. C. N. S. 352, where Mr. Hayes seems to think such a doctrine an impossibility) could make a good title to a purchaser of real estates under an implied power of sale created by a charge of debts in the original testator's will, although there was a devise of such estates to a trustee on trust to sell, such trustee, however, being the executor. The first executor devised to his executor the trust estates, "upon trust to hold or dispose of the same in the manner in which they ought to be held or disposed of pursuant to the trusts." It should be stated, that the point appears to have been conceded by the purchaser's counsel, who applied himself chiefly to another objection to the title, and one of no little importance—namely, that there had been so great a lapse of time (27 years) from the death of the testator that it could not be assumed that the executor was selling for the payment of debts, but the Master of the Rolls (admitting that whilst in such cases of implied powers of sale arising from a charge of debts, there must be a limit of time at which the court must hold that the debts have been paid, especially where there has been a transmission from executor to executor with enjoyment of the property by parties beneficially entitled) held, that when only 27 years have elapsed since the testator's death, the limit had not been reached, or, at least, not passed, and that, therefore, the executors need not answer any inquiry as to the existence or not of debts, and can make a good title to a purchaser. Altogether the decision is one likely to be the subject of much discussion among conveyancers. *Sabin v. Heap*, 1 Law Tim. Rep. 51.

## moot points.

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### No. 1.—*Rifle Corps—Policy of Assurance—Notice to Office, &c.*

A. effects a policy of assurance on his life, and subsequently joins a rifle corps, without the knowledge or assent of the office, and is accidentally killed. Is the policy vitiated by A.'s joining the corps, he having done so without informing the office? And does the joining a rifle corps come within the condition of the policy that the assurer "shall not engage in any occupations dangerous to life or limb?" Supposing A. to have joined the corps previously to effecting the policy, is he under any obligation to inform the office of the fact?

Opinions, with reasons for them, will oblige.

JOHN W. S. LAVENDER.

### No. 2.—*Devise of Lease—Subsequent Renewal thereof—Effect of adding Codicil to Will, &c.*

A. devises a lease to his daughter, and afterwards renews the lease, and afterwards adds a codicil to his will. *Quære*, whether the renewal of the lease is a revocation, and whether the adding a codicil is a republication?

JOHN W. S. LAVENDER.

### No. 3.—*Will—Construction of.*

A., by will, on the death or marriage of his (testator's) wife, gave, devised, and bequeathed all his messuages, lands, tenements, allotments, and estates, whatsoever and wheresoever, unto his son Thomas: to hold the same unto the said son Thomas, his heirs and assigns, for ever (except as in the said will is excepted). Then follows this condition—viz., "And in case my said son Thomas should happen to die *without lawful issue*, then I give, devise, and bequeath all my said real estates unto my son Christopher: to hold the same unto the said Christopher, his heir and assigns, for ever.

The widow of the said testator is since dead, and the son Thomas is now married, and has issue; and he is desirous of raising by mortgage a sum of money upon the said real estates so devised to him as aforesaid, but the person who has agreed to lend the money is doubtful as to whether Thomas Hammond, in the event of all his children dying in his lifetime, under the age of twenty-one years, and without leaving lawful issue, will have more than a life interest in the said real estate, as the words of the will are "*should happen to die without lawful issue*," but it does not say "*leaving lawful issue him surviving*."

Opinions are requested as to the following facts:—1st. Can Thomas, the son, sell and dispose of the said real estate so devised to him by the will as aforesaid, he having issue born, but such issue are now minors? 2nd. Will a mortgagee be perfectly safe in advancing money to the son Thomas on a mortgage of the said estate so devised to him by the said will of the said testator A? 3rd. The said son Thomas having issue born, can he, by will,



dispose of the said real estate as he may think proper. 4th. What will it be necessary for the son Thomas to do, to enable him to raise money by mortgage or otherwise (see *Doe d. Neville v. Rivers*, 7 T. R. 276).

M. GEORGE BOOTY (Leyburn).

No. 4.—*Tolls—Contract for Payment of Money in Lieu of—Parties, &c.*

A. wishes to make a binding contract for the payment by him, annually, of a sum of money, in lieu of paying the toll each time he passes through the turnpike gate. Who are the proper parties with whom to make such a contract?

If any correspondent can refer me to a precedent, or give the heads of such a document, with amount of stamp duty, if any, it would oblige

VIATOR.

No. 5.—*Brothers—Power of one to expel the other—Mode of Procedure, &c.*

A. and B., two brothers, have lived under the same roof for several years. B. having no means to support himself, has, up to the present time, been supported by A., and employed by him as his bailiff.

A. and B. have had several quarrels, and A. is desirous of compelling B. to leave. B., who is rather "a troublesome customer," peremptorily refuses to do so. Under these circumstances, the mooter would be glad of opinions as to what remedy A. has for accomplishing the desired object.

FRATER.

## Answers to Moot Points.

No. 142.—*Master and Servant* (Vol. 1, N. S., p. 382).

In order to constitute a contract of hiring and service there must be a mutual engagement, binding on both the employer and the employed, for the one to *employ and remunerate*, and the other to serve (*Addison on Contracts*, 3rd ed. vol. I, p. 488; *Lees v. Whitcomb*, 2 M. & P. 86; 5 Bing. 34, s. c.; *Sykes v. Dixon*, 9 Ad. & E. 693; 1 P. & D. 463, s. c.). In the present case, there is no agreement on the part of B. to find A. with employment, and, therefore, I think, the agreement is void. And again, in *Aspdin v. Austin*, 5 Q. B. 671, it is laid down that a covenant on the part of a workman to work, and on the part of his master to pay him a sum of money weekly during the two first two years, and an additional sum during the third, and to receive him into partnership at the end of three years, *does not* amount to a contract of hiring and service for three years, or for any fixed period of time. This case, which appears to me exactly in point, and also that of *Dunn v. Sayles*, lead me to think that B. is not in a position to arrest A. for his absence, and that the agreement is invalid.

A. K. R

N<sup>o</sup>. 148.—*Apportionment of Rent, &c.* (Vol. 1, N. S. p. 383).

The rent would, I think, be apportioned between B.'s representative and the remainder-man (*Vernon v. Vernon*, 2 Bro. C. C. 659; see also *Exp. Smyth*, 1 Swan. 337; *Clarkson v. Lord Scarborough*, 1 Swan. 354; *Paget v. Gee*, *Ambl.* 198; 3 Swan. 694).

A. K. R.

N<sup>o</sup>. 150.—*Sale of Partnership Property* (Vol. 1, N. S. p. 384).

A court of equity would, I think, enforce the stipulation as to the non-concurrence of the co-partners in conveying the property in question, and of signing receipts for the purchase-money.

The fact of the conveyance being made to the three partners alone, and the non-appearance of any partnership transactions on the face of such conveyance, precludes, or, at the least, entirely does away with, the necessity of the concurrence of the co-partners. The three partners to whom the conveyance was made have, by virtue of such conveyance, the legal estate vested in them, and, consequently, they are the proper and only parties, I think, necessary to make a valid conveyance of such property to a purchaser; and a bona fide purchaser for a valuable consideration, without notice that the money originally paid for the property by the three partners, was, in fact, paid out of the partnership funds, and not, as stated on the face of the conveyance, out of their own moneys, would not be affected thereby, nor would he be liable to see to the application of his purchase-money.

The conveyance was, as I take it, made to the three partners for their joint benefit, and not for the benefit of the entire partnership concern, therefore, if such is the case, the absence of any authority in the partnership articles, or any other deed or document relating to the partnership concern, authorising the partners generally, or even individually, to purchase or sell property and to give receipts for the purchase-money, would be immaterial, and of no consequence.

I consider, from the whole tenor of this point, that the three partners who have contracted to sell the property previously purchased and conveyed to them, are trustees for their co-partners who are living, and for the personal representatives of them who are dead, for the repayment of the moneys so appropriated by them in the said purchase, in proportion to their said co-partners' respective interests in the said partnership concern, and that they are liable and may be called upon to refund such moneys to them.

And even in the event of a fraud being committed (if such this is) by the said three partners in so appropriating the said partnership moneys in the purchase of such property as aforesaid, unknown to their co-partners—(but really I cannot see how it is possible for them to obtain money and appropriate it in the purchase of property unknown to the others, as surely they would be able on any future investigation of the partnership pecuniary affairs to perceive that money had been taken and used otherwise than in the usual transactions of business carried on by the firm, and of course in such a case would be incumbent on them, having regard to their own

interests, to make inquiries respecting such transactions)—they would become personally liable to their co-partners for the moneys, and it would, not as I have before stated, affect a bona fide purchaser for a valuable consideration without notice.

I should be glad to see the opinions of other correspondents on this point.  
J. W.

No. 153.—*Devise on attaining Twenty-one—Vested Estate* (Vol. 1, N. S. p. 384).

Where a testator creates a particular estate, and afterwards disposes of the ulterior property, in the event which will determine the prior estate, the words descriptive of such event occurring in the latter devise will be construed as referring to the possession or enjoyment only, which the antecedent gift has preoccupied, and not as designed to postpone the vesting.

Thus, where a testator devises lands to trustees, until A. shall attain the age of twenty-one years, and if or when he shall attain that age, to A. in fee, this is construed as conferring on A. a vested estate in fee simple, subject to the prior chattel interest given to the trustees; and, consequently, on A.'s death under the prescribed age, the property descends to his heir-at-law (*vide* *Warter v. Hutchinson*, 1 Barn. & Cress. 711; and *vide*, also *Doe d. Cadogan v. Ewart*, 7 Ad. & El. 663, in which case a testator devised his real estates to trustees, upon trust for his wife during her life or widowhood, and after her decease or marriage again upon trust to apply rents for maintenance of his daughter until she should attain twenty-five years, and on her attaining twenty-five years, to her in fee, but in case his said daughter should die without issue, he devised his estates over). The testator's wife died in his lifetime, but his daughter survived him, but died before she attained twenty-five years, leaving no issue, but having suffered a common recovery. It was held, that such recovery was effectual to acquire the equitable fee, she having a vested estate tail in equity at the time.

Therefore, having regard to the above cases, I think there can be no doubt but that the children took a vested interest in the property under the limitations, as stated in the Moot Point.  
J. W.

No. 156.—*Petitioning Creditor's Debt* (Vol. 1, N. S. p. 385).

The mooter does not seem to be aware that the proceeding in bankruptcy by *fiat* was abolished by the Bankrupt Law Consolidation Act, 1849. This fact, however, does not do away with the point, which is ingenious, but, I venture to think, fallacious. The object of the proceedings in bankruptcy is, I take it, to procure the payment of the creditor's debt, so far as the bankrupt's estate will allow; and therefore the petitioning creditor, in commencing proceedings against his debtor, must make an affidavit of his debt to show that he has a bona fide interest in the distribution of the debtor's estate, and has a legal claim upon it. But a person whose debt is barred by the Statute of Limitations has no claim upon the estate of the debtor, and cannot recover his debt. It would be a very strange and a very mischievous anomaly if a person could establish a claim by proceedings in

bankruptcy which would be altogether untenable in ordinary proceedings at law. It is true the Statute of Limitations merely expresses itself as taking away the remedy for the recovery of the debt; but I maintain that in itself constitutes a destruction of the debt so far as it is possible to destroy it. When a debt has been barred by the statute, I think it can no longer in any legal sense be said to be a debt. On the grounds, therefore, which I have above attempted to express, I have come to the conclusion that an adjudication cannot be made in the petition of a creditor whose debt is barred by the Statute of Limitations.

CAUSIDICUS.

No. 157.—*Emblements* (Vol. 1, N. S. p. 385).

Although it has been held, that if a devise be to A. for life, remainder to B., and before severance A. dies, B. shall have them; and that if a devise be to A. for life, who dies before severance, the reversioner shall have them; yet Lord Ellenborough ruled, in 8 East, 343, that every one who has an uncertain estate, or interest, if his estate determine by the act of God before severance of the corn, shall have the emblements, or they go to his executor or administrator. Thus the contrary is now established, and the executors of the tenant for life, who has sown the land, are entitled to the crops (Chitty observes, in 1 Gen. Pr. 91—94, that emblements are deemed personal property, and pass as such to the executor of the occupier (whether owner in fee, for life, or for years) if he die before he has actually cut and reaped the same. There can then, I think, be but one opinion on the point—viz., that the executors of B. are entitled to the crops.

A. K. R.

No. 158.—*General Devise—Trust Estate* (Vol. 1, N. S. p. 397).

The rule is, that a general devise will, unless a contrary intention appears, pass trust estates. Thus, an annuity charged upon all testator's estate would prevent the passing of them (*ex parte Morgan*, 10 Ves. 100), so also a charge for payment of debts, &c. In this case, the words "according to the natures thereof respectively" seem to imply that trust estates were meant to be included, but then comes the clause "upon trust to convert his said real estate into money, and invest the same for the benefit of his wife." This is, in fact, a trust to sell, and this has been held sufficient to prevent the passing of the legal estate (*ex parte Marshall*, 9 Sim. 555). I am of opinion, that, looking at this last case, the purchaser's solicitor is right in raising the objection, and I do not think it would be safe to accept the title without the conveyance by the heir-at-law.

H. M.

No. 159.—*Injury done in consequence of Negligence and Carelessness of Servant—Liability of* (Vol. 1, N. S. p. 398).

The law is, "if a servant, by his negligence, does any damage to a stranger, the master shall answer for his neglect" (2 Steph. 235, 3rd ed.). Therefore, B. is, in my opinion, the person to be sued.

H. M.

No. 159.—*Injury done in consequence of Negligence and Carelessness of Servant—Liability of* (Vol. 1, N. S. p. 389).

Where a servant having set his master down in a certain street, was directed by him to take the vehicle and put up in another street, but instead of so doing he went to deliver a parcel of his own in another street, different to the other two, and in returning along it, drove against an elderly person and injured her: in this case it was decided, that "the master was responsible for his servant's acts" (*Heath v. Wilson*, 9 Car. & P. 607; see *Mitchell v. Crasawetter*, 13 C. B. 287; and *Putten v. Rea*, 3 Jur. N. S. 892). I am, therefore, of opinion that B. is the proper party to be sued by C.'s representatives. C. R.

No. 166.—*Highway—Obstruction* (Vol. 1, N. S. p. 398).

I think that, according to the wording of the section referred to, "the defendant would be liable to a penalty for leaving the vehicle on the highway," though there was space enough for two carts, or other vehicles, to pass one another alongside his cart; and that he might be convicted under the same section for "negligently and wilfully being at such a distance from the cart that he could not have the government of the horses drawing the same." C. R.

No. 160.—*Dower* (Vol. 1, N. S. p. 398).

Provided the trustee survived the purchaser, his second wife would, I imagine, be effectually barred from dower under the purchase deed. But I apprehend this is a case in which the old inconvenience of taking the conveyance to the purchaser jointly with a trustee, for the purpose of barring dower, is very likely to be felt. H. M.

No. 161.—*Notice to Quit—Double Rent* (Vol. 1, N. S. p. 398).

A second notice to quit is a waiver of the first, unless, indeed, it is merely a warning given after the expiration of a proper notice, that if the tenant do not quit forthwith, or in so many days, he will be called upon for double value. The case in point comes, I apprehend, under this exception, and, therefore, A. will be entitled to sue for rent up to the expiration of the notice, and double rent as long as the tenant continues to hold over. H. M.

No. 162.—*Descent—Person last Entitled* (Vol. 1, N. S. p. 398).

If B. survives A., and takes under the devise, and then dies intestate with a total failure of heirs, the land will escheat to the Crown as of course in either case. It would be absurd to suppose the section referred to meant, "provided a man sells land to a purchaser, who dies without heirs, that then the land should revert to the heirs of the vendor, who has already received the full value thereof." H. M.

## Vendors and Purchasers.

**SPECIFIC PERFORMANCE.**—*Insufficient title in lessor—Land included in agreement which was in lease to lessor, together with other lands—Bill dismissed with costs—Objection taken after bill filed.*—The following is an important case as to the following points: 1. A proposed lessor, assuming to be owner in fee of the whole property, but turning out to be a termor of part; 2. The leasehold part being a portion only contained in the lease; 3. As to costs where the lessor's bill is dismissed on other grounds than those on which the defendant had insisted. It appeared that the plaintiff proposed to let a dwelling-house and land for a term of twenty-one years, being only lessee of part of the land for a shorter term, with an alleged assurance of renewal from his lessor, and other land was included in the demise to the plaintiff, and such demise contained covenants which were objectionable, and the state of the plaintiff's title to the property was not disclosed to the defendant, the proposed lessee, and was only ascertained by him after the commencement of the suit (though prior thereto, in answer to the lessee's requisition, the lessor stated that the property was freehold): Held, that the bill must be dismissed with costs, although the defendant had refused to perform his contract on other grounds (which were not gone into at the hearing), and in consequence of which the suit was instituted (*Baskcomb v. Phillips*, 1 Law Tim. N. S. 288. The further facts will appear from the following judgment of the Master of the Rolls:—"I find, upon the evidence in the case, that though the plaintiff professed to be tenant in fee-simple of the property, in point of fact he was in respect to a very considerable portion of the property only a lessee, and that the whole of the property did not exceed thirty eight acres, and that about ten and a-half acres were held under lease from Lord Sydney. And in addition to that, there was this peculiarity in the case, that the lease from Lord Sydney not only included this property, but another piece of land besides, which was not included in this demise; the consequence of which was; that not only would the defendant, if he had taken the lease, have been liable to all the covenants contained in that lease, and been affected by them; but also, if the lessee of the piece of land which was not included in his agreement should commit any act of forfeiture, the whole of the land included in the demise would revert—that is, assuming that Lord Sydney should think fit to enforce the forfeiture. Now, as to that part of the case, I may state that I am clear that this court never can deal with these cases upon the assumption that one person would not enforce the forfeiture, or that another person would enforce the forfeiture. It must make a general rule for all cases, and it must in this case, as in any other case, totally disregard any such observation as this, that, having a sense of justice, Lord Sydney would not take advantage of any forfeiture as to the other piece of land included in the demise if it were to occur. Amongst the covenants in the lease,

there is one, that if any tree is lopped, or cut down, or grubbed up, there shall be a payment of £10 for every tree, and I observe that the piece of land included in the demise by Lord Sydney, but not included in the demise to the defendant, is a garden. In consequence of that, there might be considerable risk of a forfeiture occurring in this manner. It was pressed upon me very strongly that this piece of land might be omitted altogether from this agreement, that it was not a matter of importance, that it was not essential for enjoyment, and that it was a question for compensation. But I observe that, although the agreement professes to leave forty-two acres (and that without any question, because it gives the exact details of the piece of land, the total amount of which is forty-two acres), when it comes to actual measurement, it does not exceed thirty-eight acres; that is a deficiency of four acres. That is the plaintiff's own evidence; the defendant makes it half an acre less; but then in addition to this, there is ten acres and a-half of land of Lord Sydney's which makes fourteen acres, or a deficiency of one-third. And I am still more struck with this, because this is pasture or meadow land running through the middle of the land proposed to be demised, and as far as I can judge from the map within two or three chains of the lawn, I am of opinion that this portion was necessary for the enjoyment of the property, and that it is not a mere question of compensation. If it had been a mere question of four acres, I think it would have been a mere question of compensation. I have to consider again whether this is a case which ought to stand over to see whether Lord Sydney would consent to do what would be essential to enable the plaintiff to make out a title in this case—that is, to give him power to grant such a lease, and to grant a renewed lease, or else release the defendant from any forfeiture committed in the adjoining property, and really make the covenants in the lease of the demised portion conformable to those which would be included in the demise from the plaintiff to the defendant. Now, my reason for saying that that cannot be so is this—that this is a tenant's demise for seven, fourteen, or twenty-one years, at the option of either of the parties. The result is, that practically it may be only for seven years; it is suburban villa, and it is not too much to say that parties want immediate possession. The contract was entered into in the month of March last, and in the month of December following this is the state in which the matter appears: the plaintiff is not in a position to grant a lease and *non constat* that anything can be done in the matter. It is impossible to say that this is a case for specific performance. Then there is a question of costs. It is said, 'The question of title was not the ground upon which the defendant went off from his agreement. The ground was upon certain objections which he made, which really are perfectly frivolous and completely met.' Upon that point I have not heard the defendant; the only one which appeared to be of much moment was that as to the deficiency of water, and having only heard one side, that seems to be susceptible of some explanation. But the real reason why I think the costs must follow the event is this: it is true

that the objections made by the defendant were different from that taken at the bar, but it was not till after the plaintiff's bill was filed, and upon the defendant putting interrogatories to the plaintiff, that he ascertained what the state of this case was. The consequences, therefore, would have been, that if no suit had been instituted, and no disagreement taken place, the defendant might have taken the lease, supposing himself to have a lease for seven, fourteen, or twenty-one years under a person seised in fee, and one day he might suddenly have found that he was turned out of that which he considered essential to the enjoyment of the property, and that because the title was not stated to him by the person who made the demise. It was said by Mr. Palmer, that probably the plaintiff did not know what the consequence of this concealment might be, and that he was not aware that if this demise was made to the defendant, the defendant might be incurring a liability to Lord Sydney, which he, or some assign of his, might take advantage of, and evict him from that which he considered as essential to the enjoyment of the property. That may be so, but still the plaintiff must suffer the consequences of not stating that important circumstance. And not only that; the difference between the length of the term of the plaintiff and that to be granted to the defendant might be very serious. They were both seven, fourteen, or twenty-one years. Suppose that at the end of seven years neither the plaintiff nor the defendant wished to get rid of the lease, but Lord Sydney did. Then the defendant would go on with respect to one part of the premises for fourteen years, and with respect to the other for only a year. The consequences are so serious, that I think the facts ought to have been stated to the defendant. Therefore it is that I have stopped the case without hearing the defendant's counsel, and I think I cannot do otherwise than make the costs follow the result. Therefore this bill must be dismissed with costs.

**SPECIFIC PERFORMANCE.**—*Execution of power—Evidence of consent of trustee—Non-production of title-deeds.*—A tenant for life had power to substitute other lands for those included in the settlement with the consent of the trustee; such consent to be signified by deed. A deed of substitution was prepared, to which the trustee was made a party, as consenting; but he did not execute it till several months after it had been executed by the other parties. Evidence was produced that the trustee had seen the draft of the deed, and had in fact consented to the deed before its execution: Held, that the power was well exercised, and the title to the deed was forced upon a purchaser. Whether a power would have been held to be well executed if no evidence of the previous consent of the trustee had been produced, *quære*. Although, as a general rule, a purchaser will not be obliged to take an estate where the vendor is not able to give him all the title deeds or a covenant to produce them, yet this depends upon the materiality of the deeds, and the court will decide each case according to the circumstance. *Offen v. Harman*, 8 W. R. 129.



## OLD AND NEW JUDGES, ETC.

### JUSTICES CROWDER AND KEATING—NEW SOLICITOR-GENERAL.

Mr. Justice Crowder died very suddenly on the 5th of December, 1859. For about twelve months past the learned judge had been afflicted with an inveterate ague, the paroxysms of which always affected his heart, but it was of a kind that yielded to medical treatment, and never to any great extent prevented the discharge of his judicial functions. So recently as the prior Friday, when seen by an intimate friend, to whom he paid a visit, he was in something like high health and spirits, and so late as the afternoon of Saturday, when he left his residence in Carlton-house-terrace, on a visit to the country, his domestics perceived no change in his appearance. On the suggestion of his physician, Dr Elliotson, of Conduit-street, the learned gentleman spent the greater part of the long vacation at Brighton, where his health greatly improved, and he returned to town at the commencement of Michaelmas Term, since which, we believe, he has regularly attended the sittings of the Court of Common Pleas. During the night of Sunday he was seized with a paroxysm of ague, more than ordinarily severe; Dr. Elliotson was summoned to his relief, but before he could reach his residence the learned judge had ceased to live. Sir R. Crowder was the eldest son of the late Mr. William-Henry Crowder, of Montague-place. He was born in London, and educated first at Eton, and then at Trinity College, Cambridge. He was called to the bar at Lincoln's-inn in 1821, and subsequently went the Western Circuit. In 1837 he became a Queen's Counsel, and in August, 1846, Recorder of Bristol. He represented the borough of Liskeard in Parliament, in the Liberal interest, from January 1849, succeeding, we believe, the late Mr. Charles Buller—to the time of his elevation to the bench, as a puisne judge of the Court of Common Pleas. Mr. Justice Crowder was never married, and he died in the sixty-fourth year of his age.

Sir Henry Singer Keating (one of the Editors of *Smith's Leading Cases*, and M.P. for Reading) has been appointed to the judgeship in the Common Pleas, vacant by the decease of Mr. Justice Crowder.

Mr. William Atherton, Q.C., M.P., has received the appointment of Solicitor-General, rendered vacant by the appointment of Sir Henry Keating to the judicial bench. The learned gentleman is the son of the late Rev. William Atherton, a distinguished Wesleyan minister, and sometime president of the Conference, his mother being a daughter of the late Rev. Walter Morison, a clergyman of the Established Church of Scotland. He was born in Glasgow in 1806, and was married in 1843 to Agnes Mary, the second daughter of Mr. Hall, the chief magistrate of Bow-street. In 1839 he was called to the bar by the Inner Temple, having during the previous seven years practised as a special pleader. He has represented the city of Durham since 1852, and is what may be considered a very advanced Liberal, being in favour of the ballot, a large reform of the laws, the removal of all religious disabilities, and the extension of the suffrage.

## RESULT OF EXAMINATIONS.

(*Michaelmas Term, 1859*).

As we stated would be the case, this examination extended over two days, a circumstance which, whilst it favours a candidate in one respect, will prove trying in another, as doubtless the answers will be more severely scrutinised than heretofore, and we understand it was announced that fuller answers would be required. Though the questions were comparatively easy, there were *twelve* rejected out of 105 candidates. From among the successful candidates, the examiners recommended the following gentlemen, under the age of 25, as being entitled to honorary distinction :—

RAWLINS, CYRIL MORTIMER MURRAY, aged 21, who served his clerkship to Messrs. Clarke and Morice, of Coleman-street, London.

SWAN, ROBERT, aged 22, who served his clerkship to Messrs. Fenwick and Falconar, of Newcastle-upon-Tyne; and Messrs. Harwood and Pattison, of Clement's-lane, city.

PAYNE, JOHN, aged 23, who served his clerkship to Mr. Thomas Slaney, of Birmingham, and Messrs. Chilton and Burton, of Chancery-lane.

HOLDSWORTH, CHARLES JOSEPH, aged 24, who served his clerkship to Messrs. Shackles, of Hull, and Mr. Henry Syme Redpath, of Walbrook, London.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books :—

To Mr. Rawlins, the prize of the Honourable Society of Clifford's-inn.

To Mr. Swan, the prize of the Honourable Society of Clement's-inn.

To Mr. Payne, one of the prizes of the Incorporated Law Society.

To Mr. Holdsworth, one of the prizes of the Incorporated Law Society.

The examiners have also certified that the following candidates, whose names are placed in alphabetical order, passed examinations which entitle them to commendation :—

DIXON, GEORGE CHEVALLIER, aged 23, who served his clerkship to Messrs. Dawes and Sons, of Angel-court, London.

LANWARNE, THOMAS, aged 22, who served his clerkship to Mr. Nicholas Lanwarne, of Hereford, and Mr. George Frederick Cooke, of Southampton-buildings.

MIDDLETON, STEPHEN DOUGLAS BECKLEY, aged 23, who served his clerkship to Messrs. Winterbotham, Bell, and Winterbotham, of Cheltenham, and Messrs. W. and H. P. Sharp, of Leadenhall-street, London.

PAGET, THOMAS EDMUND, aged 21, who served his clerkship to Messrs. Stone, Paget, Billson and Stone, of Leicester, and Messrs. Field and Roscoe, of Lincoln's-inn-fields.

PRICHARD, HENRY GEORGE, aged 22, who served his clerkship to Messrs. Prichard and Collett, of Lincoln's-inn-fields.

KENNY, WILLIAM, aged 22, who served his clerkship to Messrs. Wood-

cock, Part, and Scott, of Wigan, and Messrs. Bloxam and Ellison of Lincoln's-inn-fields, London.

SOAMES, FRANCIS LARKEN, aged 22, who served his clerkship to Mr. Thomas Rogers, of Reading, Mr. Thomas William Tabourdin Cooke, of Wokingham, and Messrs. Rhodes, Sons, and Duffett, of Chancery-lane.

The council have accordingly awarded them certificates of merit.

The examiners have further announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them, either to a prize, or a certificate of merit, if they had been under the age of 26 :—

GILL, HENRY ROCKINGHAM, aged 26, who served his clerkship to Mr. Thomas Gill, of Bedford-place, Russell-square.

WILLETT, HENRY SHADWELL, aged 26, who served his clerkship to Messrs. Loftus and Young, of New-inn, London.

## Notices of New Books.

### COOTE'S ADMIRALTY PRACTICE.

*The New Practice of the High Court of Admiralty of England, with the Rules of 1859, and a Collection of Forms and Bills of Costs, &c., &c.* By HENRY CHARLES COOTE, Proctor of the Court, author of "The Practice of the New Court of Probate," "The Practice of the Ecclesiastical Courts," &c., &c. 12s. London: Butterworths.

As most of our readers are aware, recently an act of Parliament has opened to the bar and solicitors the precincts, heretofore sacred only to civilians and proctors, of the Court of Admiralty; and it would appear, from its having been deemed useful to deliver a series of lectures on the Court of Admiralty at the Law Institution, and from the appearance of the present work, that it is expected that the profession generally will be benefitted by this change, and we should be glad to find it was so, but we cannot say that we expect this will extend beyond a very small number. The jurisdiction of the court is so very limited that it is only in places having a port that any business can be expected to arise, and this only very rarely. Mr. Coote, in his Preface, says: "The modern growth and present eminence of the Court of Admiralty is one of the prominent facts of the day.

"When some half century ago the court came to be presided over by Lord Stowell, such was the paucity of its legal business, that it could be said to afford that great legal luminary little else than an occasional morning's occupation.

"The tenuity of interest which attached also to that business was so undeniable that the circumstance resolved itself to the mind of his lordship as a weighty objection to the publication of the reports of the proceedings of the court, when publication was first proposed by the members of his bar. In his lordship's own words—'he feared lest the reports should expose the nakedness of the land.' But small as was the amount of business under

Lord Stowell, it became even less under his immediate successors, and the court seemed fast sinking into a state of only something more than mere vacuity.

"At this critical juncture Dr. Lushington accepted the important office of Judge in Admiralty. Under his energetic presidency the long dormant court instantly underwent a change so complete in itself, and so extensive in its results, that it can scarcely be described otherwise than as a fresh creation of law. The confidence of the public awoke as from a dream, and a corresponding amount of business at once poured into this (comparatively speaking) new tribunal.

"Dr. Lushington was thus enabled in a few years to frame and establish a system of jurisprudence for his court, not less great in idea, yet at the same time more varied in form and more grasping in comprehension, than that which his gifted predecessor Lord Stowell had in other times shaped out for the Court of Prize.

"To form the jurisprudence of a court exercising so important a jurisdiction as that of the Admiralty would have seemed enough even for the advanced intellect and distinguished learning of Dr. Lushington; but something more, though less in its degree, was required of him.

"The defective character of the procedure of the court urgently called for reform; and on the appointment to the Registrarship in Admiralty of H. C. Rothery, Esq., whose acknowledged ability indicated him as a fit associate in such an undertaking, that reform was instantly initiated, and was wholesomely and unsparingly carried out.

"The reform, which was thus initiated in 1855, has now finally been completed by the Rules of 1859. These rules, which are the production of an enlightened and accomplished mind, have, whilst approximating the practice in Admiralty to the more elastic procedure of common law, preserved those original peculiarities of the court which were its excellences and its boast.

"An act having been passed in the last session of Parliament, opening for the first time the Court of Admiralty to the bar and practitioners generally of the courts of law and equity, and upon which the before-named rules are grafted, it has appeared to me that a compilation, in character and scope such as the present, might at this time be considered to be not without its use."

The first portion of the work treats, ch. 1, of the jurisdiction of the Court of Admiralty; ch. 2, of action in rem; ch. 3, of action in personam; ch. 4, practical directions for prosecuting and defending causes. In an appendix, three of the recent statutes relating to the Admiralty Court are given, as also the rules, orders, and regulations of 1854, 1855, and 1859, with orders in council, &c., relative to fees and certain proceedings, and additional forms of affidavits, pleadings, &c., and concluding with bills of costs. With respect to the jurisdiction of the Admiralty Court, Mr. Coote states, that besides cases of maritime lien, it extends to seamen's and master's wages,

salvage, towage, pilotage, necessities furnished to a foreign ship, damage by collision of vessels, and bottomry.

"The Admiralty has also jurisdiction to enable a sole owner to regain the possession of his vessel, and to protect a dissentient part owner, in the event of the loss of a vessel under the conduct of his co-partners, by enforcing security to be given by them to the extent of his share. The former is called a cause of possession, and the latter a cause of restraining a vessel from proceeding to sea until bail be given for her safe return to the port to which she belongs.

"The Admiralty also adjudicates upon the claims of persons asserting themselves to be the owners of derelict vessels and cargoes, and restores their property to them if the proof of the ownership be satisfactory.

"The Admiralty follows the same course of adjudication when goods found in the possession of pirates are identified by their legal owners. This is designated a cause of spoliation or piracy.

"The Admiralty also entertains questions connected with, and incidental to, many of the before-mentioned matters—viz., the apportionment of salvage; the payment of balances which remain in its hands, after sale of a ship or cargo, to the persons entitled thereto; and the liability of sureties, when the vessel, whose safe return they have guaranteed, has been lost on the voyage designated in the bail bond.

"The Admiralty has jurisdiction in matters of personal damage—i.e., assault committed by the master of a vessel upon one of his seamen or passengers. Over masters themselves it possesses a corrective jurisdiction of a peculiar character—viz. it will punish for the offence of wearing illegal colours; for negligence in lowering the topsail of their vessel or striking colours to one of her Majesty's ships; and for secreting mariners in fraud of the public service; and, finally, in vindication of its courtly dignity, it may proceed against a contumacious suitor and his abettors in a cause of contempt, and, on the offence being proved, may inflict a fine, the amount of which will be determined by its own discretion.

"The modes in which the jurisdiction of the Admiralty is exercised are commonly described as in rem and in personam."

Mr. Coote has, in a volume of convenient size, furnished the practitioner in the Admiralty Court with an invaluable manual, by the aid of which he may hope to be able to take up and carry through any suits which he may be called upon either to institute or defend, whilst at the same time much information of a nature not strictly of mere practice is contained in the work, such as freight, lien, sales, salvage, wages, and other subjects of maritime law. It is not merely that Mr. Coote's volume is the only existing book of practice that is to be recommended, but that it is a very excellent and complete production, leaving little chance of there being any successful rival.

#### WHARTON'S LAW LEXICON.

*The Law Lexicon, or Dictionary of Jurisdiction: explaining the technical words and phrases employed in the several departments of the English Law;*

*including the various legal terms used in Commercial Transactions; together with an Explanatory as well as Literal Translation of the Latin Maxims contained in the writings of the Ancient and Modern Commentators.* By J. J. S. WHARTON, Esq., M.A., Oxon, Barrister-at-Law, &c., &c. Second Edition, 25s. London: Stevens and Norton.

It is but recently we had occasion to speak of the first edition of this work, mentioning that its utility was lessened by reason of the alterations which had been made in practice and pleading in equity and at common law, and we had not then any reason to anticipate a second edition which would remove these deficiencies. Having now the work before us in the shape of a second edition, we are better able to give an opinion respecting it. As we learn from Mr. Wharton's preface, his object has been to produce a "Dictionary especially adapted to ready reference, which should contain the modern law and alterations, as also the terminology comprehended in our varied and intricate jurisprudence. \* \* \* The aims attempted, throughout its arrangement, have been compression, avoiding obscurity, and yielding information easily and effectually. \* \* \* Occasional passages from the Jewish, Greek, and Roman antiquities have been quoted, either to illustrate a doctrine, or to indicate an analogy: but of this sparing use has been made, as their too frequent insertion would have increased bulk, without, perhaps, augmenting value." In the advertisement to the second edition, we are informed that the text of the previous edition has been revised, the citations verified, and the law in all its branches exhibited to the best of the author's ability in accordance with the most recent statutes, cases, rules, and orders. Many articles have been rewritten, others inserted, and all amended. A great number of terms and phrases has been added, more especially those which relate to civil, mercantile, and international jurisprudence, and to the Hindu and Mussulman juridical systems, as administered in India; as well as those which have been invented to supply the exigencies of modern developments. The size of the book is therefore enlarged, but it is hoped not uselessly, as the purpose has been to preserve a due medium between a scanty vocabulary of mere words, and a prolix cyclopædia of exhaustive discussions, that the work may render concise information upon the given subject, and become a serviceable auxiliary to further knowledge by indicating the locality of its sources.

It is quite unnecessary, after setting out the title-page of the work, and giving extracts from the preface, that we should state the general contents of the volume, further than that it purports to furnish the usual matter of an English law dictionary, with the addition of occasional articles relative to the civil and foreign laws. With regard to the articles on English law, they appear, so far as we have been able to examine them, very correct, bringing down the law to the present time. A considerable portion of the work is occupied with the explanation of obsolete terms, which we presume will be acceptable to some readers, though probably a larger class will object to the space occupied by the explanation of these terms, more especi-

ally as the principal portions of them have nothing more than an antiquarian interest. The terms of the Scotch law are also explained, which may be useful to those who have any intention to do what few Englishmen ever do—like the Scotch who have once turned their backs on the Tweed—seek to better their fortunes in that part of her Majesty's dominions.

One feature of the work is, as prominently stated in the title-page, the insertion of Latin maxims "contained in the writings of the ancient and modern commentators," with translations thereof, "explanatory as well as literal"—a feature which, if judiciously done, must necessarily be useful to the student if not to the practitioner. Mr. Wharton is, of course, entitled to pursue his own method with relation to these; but we fear many readers will feel disappointed at having merely a translation of the maxims, and that frequently of so literal a character as not to be intelligible, of which we might adduce many examples, but the following, no doubt, will suffice:—*Actiones compositæ sunt, quibus inter se homines disceptarent, quas actiones, ne populus prout vellet institueret, certas solemnesque esse voluerunt*: "Forms of action have been framed by which men dispute amongst themselves, which forms are made definite and solemn, lest the people proceed as they think proper." *Actus repugnans non potest in esse produci*: "A repugnant act cannot be produced as in responsible existence." *Affectio tua nomen imponit operi tuo*: "The affection of a person gives a name to his work." *Animus ad se omne jus ducit*: "Intention attracts all law to itself." *Animus hominis est anima scripti*: "The intent of a man is the soul of his writing." *A non posse ad non esse sequitur argumentum, necessarie negativè, licet non affirmativè*: "An argument necessarily in the negative follows from the not possible to the not being, though not in the affirmative." We fear many of Mr. Wharton's readers will be sorely puzzled to make any sense out of his translations; and more so, because, notwithstanding the prominence given in the title-page to this portion of the work, no illustrations or explanations of the maxims are attempted. We know, indeed, by experience, how difficult it is to give a sensible translation of Latin maxims, if done literally; but Mr. Wharton also professes (in his title-page) to give "explanatory" translations, which, however, he has wholly failed to do. We think that many readers will, looking to the prominent manner in which the subject of Latin maxims is put forth on Mr. Wharton's title-page, feel disappointed that the maxims are not attempted to be illustrated or applied, though, of course, it was quite competent to Mr. Wharton to do this or not, so long as intending purchasers are not misled.

There are some articles on subjects belonging to medical jurisprudence which it appears to us would have been much better omitted, especially in a work designed principally for young men. We allude to those on pregnancy, rape, &c., where the views of Beck and other medical writers are stated pretty fully, and which might possibly be in place in a work dedicated to medical jurisprudence, but are scarcely suitable to a Law Lexicon. We think these articles above would induce many parents to decline placing the book in the hands of their sons.

We present an extract from a part of the work which will best exhibit the manner in which Mr. Wharton has performed his task, by exhibiting a variety of terms, both old and new:—

**APPEARANCE SEC. STAT.** (*i. e.* *secundum statutum*), which was enered at law by a plaintiff for a defaulting defendant under 12 Geo. 1, c. 29, and 2 W. 4, c. 39, is abolished by 15 & 16 V. c. 76, s. 26.

**APPELLANT**, the party appealing; the party resisting the appeal is called respondent.—*Encyc. Lond.*

**APPELLATE**, appealed against.—*Ibid.*

**APPELLATE JURISDICTION**, the power of a superior court to review the decision of an inferior court.

**Appellatione fundi**, omne sēdificium et omnis ager continetur.—4 Co. 87. (Under the word “fundus” every building and every field is comprehended.)

**APPELLEE**, one who is appealed against or accused.—*Encyc. Lond.*

**APPELLOR**, a criminal who accuses his accomplices, one who challenges a jury, &c.—*Ibid.*

**APPENDANT**, a thing of inheritance belonging to another inheritance which is more worthy: as an advowson, common, &c., which may be appendant to a manor, common of fishing to a freehold, a seat in a church to a house, &c. It differs from appurtenance, in that appendant must ever be by prescription—*i. e.* a personal usage for a considerable time, while an appurtenance may be created at this day, for if a grant be made to a man and his heirs, common in such a moor for his beasts levant or couchant upon his manor, the commons are appurtenant to the manor and the grant will pass them.—*Co. Litt.* 121 *b.*

**APPENDITIA**, pertinances of an estate.—*Blount.*

**APPENNAGE**, or **APENNAGE**, a child's part or portion, and is properly the portion of the king's younger children in France, where by a fundamental law, called the law of appennages, the king's younger sons have duchies, counties, or baronies granted to them and their heirs, &c.; the reversion being reserved to the Crown, and all matters of regality as to coinage and levying taxes in such territories.—*Spelm.*; *Cowel.* See **Appanage**.

**APPENSURA**, the payment of money at the scale or by weight.—*Spelm.*

**Applicatio est vita regulæ**.—2 Buls. 79. (Application is the life of a rule.)

**APPODIARE**, to lean on or prop up anything.—*Wals.* 1271; *Mat. Paris Chron.*

**APPOINTEE**, a person selected for a particular purpose; also the person in whose favour a power of appointment is executed.

**APPOINTMENT**, direction, designation, the selection of a person for an office.

We consider the work a valuable one, and that it reflects great credit on Mr. Wharton, as he has evidently exerted himself to make it as correct as possible; and for those students who are ambitious to be learned not only in the modern but also in the obsolete doctrines of English law, and likewise to have some acquaintance with the civil laws, the municipal laws of other countries, and medical jurisprudence, the “Lexicon” will be useful. It



certainly contains a great mass of information not to be found in any other single work.

In conclusion, we may state that we have formed a very favourable opinion of the work, taken as a whole, inasmuch as it is evident that Mr. Wharton has exerted himself to make it as complete as his plan would permit, and to make it trustworthy in its statements, whether relative to the old or modern terms of the law, our own or the civil laws, or those of foreign nations. The quantity of reading in the volume is very considerable; and though perhaps it is not desirable that any student should attempt to read it through consecutively, no little information is to be gleaned from it. The explanations of the older terms will probably form the chief inducement for its purchase by most students, as at least it appears to us that this feature is the one which Mr. Wharton had principally in view in compiling the volume. Several of the modern titles also contain much useful information, though the absence of authorities must necessarily detract somewhat from the utility of this portion of Mr. Wharton's undertaking.

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## Summary of Decisions.

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### CONVEYANCING AND EQUITY.

**ASSETS.**—*Administration summons*—*Admission of assets*—*Priority of legacies*—*Annuity.*—An executor cannot be charged upon an admission of assets on an administration summons. A testatrix bequeathed the residue of the moneys to arise from her real and personal estate to the children of W., and directed that her trustee should, in the first instance, out of such residue, pay an annuity of £20. The assets were insufficient: Held, that the pecuniary legatees were entitled to be paid in priority to the annuitant. *Re Wiltshire*, 8 W. R. 133.

**INTERPLEADER.**—*Sheriff—Equity jurisdiction.*—The following case of interpleader was of a somewhat novel character, inasmuch as it arose out of a seizure on a fi. fa., issued out of Chancery, and so was not a case within the statute relating to interpleader; that being confined to fi. fas. at common law, such a writ, indeed, not being then issuable in equity. The Vice-Chancellor did not give a decided opinion on the important question, whether the court should entertain an interpleader in such cases, though why they should decline it is not easy to say. He, however, decided that the sheriff should show affirmatively that at the time of the seizure and notice, he had reason to believe the goods belonged to the defendant, and, in the next place, should apply to the court promptly. The facts were as follows:—A call being made by the official manager in a winding-up case upon H., as one of the contributories in the A. company, on his failure to pay, a fi. fa. was issued against him, and the sheriff seized his goods. On the next day, two other persons claimed the goods, and threatened legal proceedings, the official manager refusing to withdraw the process. The

sheriff, after three weeks, filed a bill of interpleader: Held, that there was no sufficient allegation, that at the time of the seizure the plaintiff knew that the goods were goods of H., and that he ought to have filed his bill instanter. Motion refused, with costs. *Señble*, *prima facie*, the Legislature having given protection to a sheriff-at-law, a court of equity would have the same power. *Tufton v. Harding*, 8 Week. Rep. 122.

**LEGACIES.**—*Additional, cumulative, and substitutional*—*Charitable legacy.*—The following was the case of legacies to a charity, respecting which the reader is referred to LAW DICT., p. The principal point in dispute was, as to the effect of two legacies given by two different instruments,—i. e., one by a will, and another by a codicil. It may be observed, that legacies given by different instruments are of three kinds: 1. Cumulative; 2. Additional; 3. Substitutional. An additional legacy is cumulative and something more. A cumulative legacy involves mere arithmetical addition: it implies two sums in place of one; whilst an additional legacy implies that the will is to be read as if the two sums had been inserted together in the first instrument, and as if the second legacy was a correction of the will, and having, therefore, the incidents of the first. A testator, by his will, gave a legacy of £500 of pure personalty property to a charity. By a codicil, he “gave and bequeathed to the same charity the sum of £1,000:” Held, reversing the decision of V. C. Wood, that the second legacy was not only cumulative but “additional,” and subject to the same conditions as to payment, &c., as the first legacy, and was, therefore, payable out of pure personalty. *Johnstone v. Lord Harrowby*, 8 W. R. 105.

**MORTGAGE OF WIFE'S PROPERTY** [see 4 L. C. 332, 333].—*Form of proviso for redemption—Reconveyance to the husband and his heirs.*—In vol. 4, pp. 332, 333, we have mentioned the rules applicable to mortgages of the real estate of a wife for her husband's purposes—namely, that the wife's estate is considered as a surety only for the debt; if the equity of redemption be reserved to the husband, he has it, as before he had the legal estate, that is, *jure uxoris*; that the mortgage will operate as such only, unless there be some recital of intention that the husband shall be entitled to the benefit of the equity of redemption, &c. These principles ruled the following case, in which it appeared that a mortgage was made by husband and wife of the wife's estate, and the proviso for redemption directed that the mortgaged property should, on payment of the principal and interest, be reconveyed to the husband and his heirs; the mortgage had since been paid off with the wife's money, and a reconveyance made to the husband and his heirs: Held, that, on the occasion of executing the mortgage, the wife had not intended to agree to anything more than a mortgage of the property, and therefore that the proviso for redemption should have directed a reconveyance to the wife, and a reconveyance was directed accordingly. *Stanfield v. Hallam*, 1 Law Tim. N. S. 179.

**PUBLIC COMPANY.**—*Railway company—Lands Clauses Consolidation Act, 1845, s. 92* [see 4 L. C. 21]—*Part of building* [see 1 L. C. 419, 450]—*Garden part of “house.”*—The following decision is confirmatory of *Grosve-*

*nor v. Ha. J. R. Co.*, 4 L. C. 21, it being held that where a railway company, under their compulsory powers, took a small strip of ground forming the extreme end of a garden attached to a dwelling-house, they were liable, under s. 92 of the Lands Clauses Consolidation Act, to purchase the whole of the house and premises. *Cole v. West-end of London, &c., Co.*, 1 Law Tim. N. S. 178.

**PUBLIC COMPANY.**—*Joint Stock Company's Registration Act* (7 & 8 V. c. 110)—*Contract with director.*—The 7 & 8 V. c. 110, s. 29, provides, that "if any director of a joint stock company registered under this act shall be either directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the company, whether for land, materials, work to be done, or for any purpose whatsoever, during the time he shall be a director, he shall, on the subject of any such contract in which he may be so concerned or interested, be precluded from voting or otherwise acting as a director; and that if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an article, or of service which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers) shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting," &c. It has been decided that where a person, although not properly appointed a director of a joint stock company, sits at the board and acts as such, the court will, under the above 29th section of the 7 & 8 V. c. 110, so far treat him as a director as to disallow his claim under a contract for executing works for the company. *Exp. Stears*, 29 Law Journ. Ch. 43.

#### EQUITY PRACTICE.

**CHIEF CLERK'S CERTIFICATE.**—*Objections to—Time for taking—Effect of not taking.*—An objection to a chief clerk's certificate must be made by summons either before signature or approval, and cannot be made on the cause coming on for further consideration. *Lambe v. Orton*, 8 W. R. 111.

**CONDUCT OF SUIT.**—*Two suits—Prosecuting order for payment of money into court.*—Where a plaintiff in one cause does not proceed with sufficient diligence to prosecute an order for payment of money into court, the conduct of that order will be given to another plaintiff in another cause interested in such payment into court being made. But the general conduct of the suit will not be taken away from the plaintiff, where no collusion between the parties is established. *Vanderwell v. Vanderwell*, 1 Law Tim. N. S. 266.

**FEME COVERT.**—*Consent to payment of a fund out of court—Unascertained sum.*—The rule that a court of equity will not take the consent of a

married woman to the payment out of court of an unascertained sum, applies even where it is clear that the sum must be one of two amounts, and she is willing to consent to the payment of the larger. *Moss v. Dunlop*, 29 Law Journ. Ch. 39.

**PARTIES TO SUIT.**—*No legal personal representative*—*Chancery Amendment Act*, 15 & 16 V. c. 86, s. 44 [1 L. C. N. S. 307, 308].—By the 15 & 16 V. c. 86, s. 44, where any deceased person interested in the matters of a suit has no legal personal representative, the court may either proceed in the absence of a legal personal representative, or may appoint some person to represent the estate. Where a party deceased, to whom a personal representative is required, is the settlor of a deed which is disputed, and upon which the suit was founded, the court will not, under the 44th section of the above act, appoint a person to represent the estate of such deceased party. *Vacy v. Vacy*, 1 Law Tim. N. S. 267.

**STAYING SUIT.**—*Two suits—Snapping a decree.*—The rule that where there are two suits for administration of an estate in different branches of the court, they shall both be prosecuted in that branch where a decree is first made, is subject to the qualification that the first decree is fairly obtained. *Harris v. Gandy*, 29 Law Journ. Ch. 38.

#### COMMON LAW.

**BILL OF SALE.**—*Description of grantor—Occupation.*—This is another of the many cases relating to the description of the grantor or the witnesses (see 1 L. C. N. S. 184). A person who had been an attorney's clerk, at the time of giving a bill of sale was acting as clerk in law matters to a person who was improperly acting as attorney, using an attorney's name for the purpose, and described himself as "gentleman" in the bill of sale: Held, that was not a proper description of his occupation, which was that of an attorney's clerk. *Beales v. Tennant*, 1 Law Tim. Rep. N. S. 295.

**BILL OF SALE.**—*Sale of goods—Receipt for the purchase money—Registration of Bill of Sale Act*—17 & 18 V. c. 36 [see 1 L. C. N. S. 91, 184, 227; F. Bk. 204; 3 L. C. 45, 87, 259].—A mere memorandum or receipt for the purchase money, not intended to operate as a record of a sale absolute or conditional of chattels, does not require to be registered under the Bill of Sale Act. *Thompson v. Barrett*, 1 Law Tim. N. S. 268.

**FALSE IMPRISONMENT.**—*Evidence—Giving in charge.*—The following is a case on the question what will constitute such a giving into custody of a party as to entitle the latter to maintain an action for false imprisonment (see 3 L. C. 377; 5 Id. 213; 1 Id. N. S. 157). It appeared that a dressing case, the property of W., was stolen from defendant's house; suspicion fell on the plaintiff, who was his servant; a policeman was sent for and informed of the facts. W. left the room to consult defendant; on her return she said, "Mr. D. says you are to take her into custody." Held, that the answer was admissible as evidence against the defendant. The defendant afterwards went to the police-office, and signed the charge-sheet: Held, that there was evidence to support a verdict against him. *Harris v. Dignam*, 1 Law Tim. N. S. 169.

**LANDLORD AND TENANT.**—*Distress bailiff—Man in possession—Authority to receive rent.*—The following case is an authority for saying that a man put in possession on a distress is not authorised to receive the rent, and that, therefore, a tender to such a person would not be of any avail. A landlord to whom rent was due, duly authorised a broker to distrain. The distress having been made, a man was left in possession, to whom the plaintiff (the tenant) tendered the amount due and costs; the man in possession refused to accept the same, and referred the plaintiff to the broker, who lived near, and offered to send for him. Application was then made by the plaintiff to the landlord, who said he had left the matter in the hands of a broker; no tender was ever made to the broker: Held, in an action for remaining in possession of the goods after tender, that the man in possession had no authority in law to receive the rent: *Semble*, that the broker had such authority, and that a tender to him would have been good. *Bolton v. Reynolds*, 1 Law Tim. N. S. 166).

**NOTICE OF ACTION.**—*False imprisonment—Malicious Trespass Act—Bona fides.*—A female who occupied a house belonging to the defendant saw a man, on a Sunday, throw a stone at the window of the house. She immediately pointed out to the defendant two men running away, saying it was one of them, "the one with the stick," and telling him to arrest them. He did so, and one of them, the plaintiff, was proved to be the one who had thrown the stone: Held, that there was reasonable ground for giving him into custody, and (the jury having found bona fides) that the defendant was entitled to notice of action. *Quære*, whether there was justification. *Jones v. Howell*, 29 Law Journ. Ex. 19.

#### COMMON LAW PRACTICE.

**ARBITRATION.**—*Bankruptcy of one of the parties—Costs—Indictment.*—An indictment by one omnibus company virtually against another rival company for conspiracy, was removed into the Court of Queen's Bench and referred to an arbitrator, who was to award what was to be done by the parties. During the pendency of the reference, one company was ordered to be "wound up:" Held, that the other company was entitled to a rule to revoke the submission, unless security was given for future costs by the other company. *Re The Metropolitan Saloon Omnibus Company*, 1 Law Tim. N. S. 294.

**BAIL.**—*Deposit—Taking out of court money paid in lieu of bail—7 & 8 G. 4, c. 71, s. 2* [F. Bk. 265; Com. L. Pract. pp. 96, 97].—The defendant having been arrested under a *capias* indorsed for the amount of the debt, thereupon, in lieu of giving bail, deposited with the sheriff the said amount and £10 for costs. He did not put in and perfect special bail, or pay the additional sum of £10, under 7 & 8 G. 4, c. 71, s. 2 (see C. L. Pract. 96, 97) as further security for costs, but went abroad. The Court of Common Pleas, on affidavit stating these facts, and showing that judgment had been duly signed, allowed the plaintiff to take the money out of court; the rule to be served at defendant's last known place of abode, or his attorney, if

known, otherwise to be stuck up in the master's office. *Semble*, such an application ought to be made at chambers. The practice, as stated in 1 Chitty's Archbold, by Prentice, 821, that such a motion must be made in the full court, is not correct. *Patton v. Gordon*, 1 Law Tim. N. S. 296.

**VENUE.**—*Change of—Special grounds—Fair trial.*—In an action by the owner of a ship against the Mersey Dock and Harbour Board for negligence, whereby the ship was lost, the venue was laid in London. A similar action by the owner of the cargo had been tried at Liverpool, and a verdict found for the defendants. The judge who tried that cause having, on the defendant's application, refused an order changing the venue to Liverpool, being of opinion that a fair trial could not be had there, the court refused to interfere, although the parties and all the witnesses reside there, and a view would be necessary, and great inconvenience and expense would result from a trial in London. *Penhallow v. The Mersey Dock and Harbour Board*, 29 Law Journ. Ex. 21.

#### BANKRUPTCY.

**ALLOWANCE.**—*Hearing in county court—Remand of insolvent—Allowance to the prisoner from the detaining creditor.*—Where an insolvent shall, upon his adjudication, either in the Court of Relief of Insolvent Debtors, or the county court, be liable to further imprisonment at the suit of any creditor, the court is authorised by sec. 86 of the 1 & 2 V. c. 110, on the application of the insolvent, to order the creditor at whose suit he shall be imprisoned to pay to him such sum or sums of money not exceeding the rate of four shillings by the week in the whole, at such times as the court shall direct; and it is enacted that on failure of payment thereof, the court shall forthwith order the insolvent to be discharged. *Quære*, after an adverse adjudication in a county court, is the application of the prisoner for an allowance from his detaining creditor to be made to the court of reference and hearing, or to the Insolvent Court: Held, that the court in London has jurisdiction to entertain and deal with the application. *Re Guy*, 1 Law Tim. N. S. 219.

**COMPOSITION.**—*B. L. C. Act, 1849, ss. 230, 231 [See 2 L. C. 302; 4 L. C. 16, 276, 388].—Bankrupt making a private bargain with a creditor to prefer him.*—One of the principal objects of the bankrupt laws is to secure an equal distribution of the debtor's property among the creditors (except where either the law or the diligence of the creditor has given or secured a priority), so as that none shall have any advantage over the others. Sec. 230 of the B. L. C. Act permits the superseding of a bankruptcy upon the payment of a composition approved of at a meeting of creditors, but sec. 23 enacts that any creditor agreeing to accept any gratuity or higher composition for such assenting to the supersedeas, shall forfeit the debt due to him, together with the gratuity and composition (2 L. C. 302; 4 Id. 388). Independently of this provision, it is a fraud for a creditor to do an act for the benefit of the bankrupt with a view to lead the other creditors to follow

his example where such creditor receives (unknown to the others) a larger amount than they are to receive: if the real reason for the creditor giving his consent or otherwise acting for the benefit of the bankrupt is the result of any secret arrangement, the influence of his example is a fraud on the others; and where fraud is shown to have been committed, equity will give relief, though it might be available at law. These remarks will account for the decision in the following case. In September, 1855, the plaintiff being unable to meet his engagements, petitioned the Court of Bankruptcy for an arrangement with his creditors under the act. The first private sitting was directed to be held on the 25th of September. On the 21st the plaintiff filed the accounts required by the act, and set forth the proposal he was prepared to offer. The meeting was held, but the proposal was not assented to, and the plaintiff was adjudicated a bankrupt. The creditors proved their debts, and amongst others, the defendants proved a debt of £1,556. On the 25th of April, 1856, the plaintiff wrote the defendants a letter, proposing to give them an acceptance of a bill of exchange for "an additional" five shillings, making together with a former arrangement, ten shillings in the pound. The proposal was accepted, and the defendants subsequently assigned their debt to A. for the sum of £389, being at the rate of five shillings in the pound, by an instrument which made no allusion to the arrangement between the plaintiff and the defendants. The plaintiff afterwards offered his creditors a dividend of four shillings in the pound, which was agreed to, and the bankruptcy was annulled. Judgment was obtained on the acceptance, and the plaintiff filed a bill for an injunction: Held, that the transaction was an illegal one, both in equity and under the Bankrupt Act, and that it must be set aside, and injunction made perpetual, with costs. *Mare v. Sandford*, 1 Law Tim. N. S. 183.

**PARTING WITH PROPERTY.**—*Within three months of the petition—Allowance of attorney's costs of preparing the petition.*—In the following case, turning property into money and paying it into court was held not to be a parting with property within three months of the petition within the meaning of the Protection Acts. Where the insolvent's attorney deducted his costs of preparing the petition and other proceedings from the proceeds of the sale of petitioner's estate: Held, that the allowance of the attorney's costs was within the meaning of the act, the expense of petitioning, being one of the exceptions specially enumerated in the statute. *Re House*, 1 Law Tim. N. S. 220.

#### PROBATE AND DIVORCE.

**DISSOLUTION OF MARRIAGE.**—*Practice—Amendment of petition.*—The petition by a wife for dissolution of marriage, on the ground of adultery and desertion, may be amended by adding a charge of cruelty, if the court be satisfied that the fresh charge is brought forward bona fide, and not for the purpose of vexation. Where a citation has issued for dissolution of marriage on the ground of adultery and desertion, and the peti-

tion is afterwards amended by adding a charge of cruelty, if the respondent has appeared to the original citation a fresh citation is requisite. *Rowley v. Rowley*, 29 Law Journ. P. & M. 15.

**HUSBAND AND WIFE.**—*Divorce—Scotch marriage—Separation—Domicil—Will.*—A wife cannot obtain a domicil of her own, independent of that of her husband. A Scotch divorce is inoperative on an English marriage. A. and B. were married in England, and resided here for many years. Differences then arose between them, and, by agreement, they lived separate from each other. B. had the power to dispose of certain property by deed or will. In February, 1854, A. went to Scotland, and committed adultery there. He resided there till the middle of June, in that year. While he was so residing there, B. instituted a suit against him for divorce, on the ground of adultery. Pending the suit, she made a will in favour of C. A decree of divorce was pronounced. She married C., and went with him to France, where she lived till her death. In June, 1856, she made a testamentary paper revoking all former wills; Held, that the divorce was inoperative; that she had no domicil but that of her husband A.; and that, consequently, the French will was void. *Dolphin v. Robins*, 29 Law Journ. P. & M. 11.

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## Moot Points.

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No. 6.—*Reading-room of British Museum—Wrongful dismissal—Remedy, &c.*

B. was admitted a member of the Reading-room of the British Museum. Shortly after his admission, he was summoned before the principal librarian, and informed that he (B.) had written the initial of his name (B.) in several of the books, and was thereupon dismissed the use of the room. B. avers that he did not write his initial in the books, and has made frequent applications to the trustees for readmission to the room, or for the grounds upon which they found their verdict of "guilty" against him; but the only reason assigned is, that, as his name begins with B., there is *prima facie* evidence that he was the writer!! As there are, undoubtedly, other readers whose names begin with B., this is, of course, no evidence at all (much less *prima facie* evidence), and B., therefore, intends to take proceedings for restitution of his rights, but wishes to know what proceedings to take, and against whom to take them?

Will the Editors of the *LAW CHRONICLE*, or some correspondent, kindly give the required information, and oblige

LECTOR.



## Answers to moot Points.

### No. 158.—*General Devise—Trust Estates* (Vol. 1, N. S. p. 397).

Notwithstanding the opinion of "J. H.," that the devise in this case is sufficient to pass trust estates and estates held by way of mortgage, I must give my opinion on the point in the negative. Certainly, the rule is that trust estates will pass by a general devise (which is a devise not expressly including nor excluding property of the particular description in regard to which the question is raised), provided there be nothing in the purposes and objects of the devise to raise an inference of a contrary intention.

But if a devise be to uses to bar dower, to uses in strict settlement, or subject to executory limitations, or creates a general charge for the payment of debts, legacies, or other moneys, the trust or mortgage estates will not pass (*vide* *Roe v. Reade*, 8 T. R. 118; *Exparte Morgan*, 10 Ves. 101; and *Lindsell v. Thacker*, 12 Sim. 178); and it was decided in the case of *Exparte Marshall*, 9 Sim. 115, that the same negative doctrine would apply to a "devise in trust for sale," although it has been held such a devise will pass lands contracted to be sold, which may be considered for some, but not for all, purposes as trust estates.

In the present case L. expressly devised all his real and personal estate whatsoever to C. and D. and their heirs, "upon trust to convert the same into money," for the benefit of his wife. What construction must we put upon such a devise? We cannot construe it into anything else but a "devise in trust for sale," although the word sale is not made mention of—merely the word convert; but, notwithstanding that, I think there cannot be the slightest doubt but that this is a devise in trust for sale.

Therefore, considering such to be the case, I think the solicitor's objection to the title is perfectly good, and would be sustained in equity, and that the concurrence of B.'s heir-at-law would be essential to make a valid conveyance to a purchaser. Indeed I think a purchaser would not be safe in accepting a conveyance without his being made a party to it, and without his concurrence the conveyance would be liable to be set aside.

I think, therefore, that this is not such a devise as will pass trust and mortgage estates.

J. W.

### No. 165.—*Equitable Mortgage, &c.* (Vol. 1, N. S. p. 398).

A mortgagee, or other assignee of the legal estate in a lease, is liable to the rents and covenants, whether he has taken possession or not (*Williams v. Bosanquet*, 3 J. B. Moore, 500; overruling *Eaton v. Jacques*, 2 Dougl. 455); and it seems that, under particular circumstances at least, an equitable assignee of a lease, or even a mere depositary, who has taken possession of the premises, will be compelled to take an assignment, to enable the lessor to sue him at law on the covenants of the lease. But the position that a mere depositary of a lease may, in every instance, be obliged to

assume that liability, has been recently disavowed. It appears to me to depend on the fact of whether the equitable mortgagee or depositary of the lease has or has not taken possession; it appears to have been decided so by the cases of *Lucas v. Comerford*, 1 Ves. jun. 235; *Jenkins v. Portman*, 1 Kee. 435; and *Moores v. Choat*, 9 Sim. 508; but it is clear that an equitable mortgagee not having taken possession, or agreed to take a legal assignment, is not liable to the covenants.

Mr. Jarman thus states in vol. 5, p. 184, after citing the above cases: "It seems that a depositary of a lease who does not, by taking possession or otherwise, take upon himself the character of assignee, cannot be obliged to do so at the suit of the lessor, and is not liable in equity upon the covenants;" and even in the case of *Sparks v. Smith*, 2 Vern. 275, equity refused to assist a lessor seeking performance of a covenant to repair against a mortgagee by legal assignment, on the ground, not that equity will not execute a covenant to repair, but that the assignee was only a mortgagee, and had never been in possession. I am of opinion, therefore, after a little consideration, that the equitable mortgagee will not be liable to the covenants in the lease deposited with him as a security for the money advanced by him, if he has not entered into possession. Of course, if he has done so, it would be otherwise, as appears by the cases cited above. J. W.

No. 1.—*Rifle Corps—Policy of Assurance—Notice to Office, &c.* (ante, p. 27).

In this case, to the first and second queries, whether being in a rifle corps is dangerous to life or limb (for the question turns on this), I answer No. For, according to my opinion, the words quoted from the policy are intended to affect those persons who are regularly engaged in a dangerous occupation—such, for instance, as a sailor, or an engineer on the railway, &c.—these come within their meaning; but no sensible person can say there is danger attending a rifle corps, at any rate for the present, and I think the fact that a great many companies are willing to insure the lives of volunteers without any increase of the premium, substantiates my view of the case. To the third query, I should say it is not absolutely necessary for A. to inform the company, but to prevent litigation it would be advisable to do so. J. H.

No. 2.—*Devise of Lease—Subsequent Renewal—Effect of adding Codicil, &c.* (ante, p. 27).

A renewal of a lease is certainly not a revocation. By the late Wills Act, it was expressly enacted that devises should take effect from, and should pass all the estate vested in the testator at the date of his decease. There can be no doubt that the renewal of lease mentioned in the moot point is such an after acquirement of property as that contemplated in the act, and I am therefore of opinion that it does not constitute a revocation.

A codicil republishes a will, and makes the will speak from the date of the codicil (*Da. 178; Law Chron.* April, 1859). T. P. TOMES.

No. 3.—*Will—Construction of (ante, p. 27).*

On referring to the 25th section of the Wills Act, as to the words "die without issue," "die without leaving issue," or "have no issue," which are to be construed to mean a want or failure of issue in testator's lifetime, or at his death, and not an indefinite failure of issue, I am of opinion that Thomas takes an absolute estate in fee simple, and therefore—1st and 3rd, can sell and dispose of the estate in any manner he may think proper; 2nd, a mortgagee will be perfectly safe in advancing money on a mortgage of the said estate; 4th, I am unable to refer to the case cited in the moot point; but, in the event of Thomas taking an estate in fee simple, he must adopt the usual course.

T. P. TOMES.

No. 3.—*Will—Construction of (ante, p. 27).*

In answer to the mooter's first question, I am of opinion that Thomas cannot dispose of the estate; for should it happen that his children die in his lifetime, there is no question but he takes only a life interest. To the second question, a mortgagee would have anything but a good security; for, if Thomas's children die during his life, at his death the mortgagee would have no claim upon the estate. The better plan would be for Thomas to insure his life in a sufficient amount, and transfer the policy to the mortgagee as collateral security. To the third question, at his death Thomas may devise the property, if his children survive him. To the fourth question, Thomas should get his brother to relinquish his interest; or, if Thomas wishes to convey the estate, let C. join in the conveyance.

J. H.

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 CORRESPONDENCE ON MOOT POINTS.

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*List of Correspondents—Insertion of Answers.*

We now supply a revised list of correspondents on a new system, mentioned in Vol. 1, N. S. pp. 27, 28, 35, 36. In doing this we have two or three remarks to make which, having been suggested to us by correspondents, have been considered by us as deserving adoption.

In the first place, complaint is made that some of the answers are not correct, that many of them bear on the face of them evident marks of being extracted from books without much consideration, and that too much space is occupied by the answers. We cannot deny the truth of these allegations, and we have, indeed, lately sought to mitigate the evils complained of by refusing admission to many answers, though we fear we have been scarcely rigorous enough in this respect. We have resolved for the future to adopt a plan which, whilst augmenting the utility of the system of correspondence, will insure more satisfactory answers. For this purpose we propose not to insert any answers except such as have been the result of correspondence, and exhibit on the face of them such difficulty, or novelty, or originality of treatment, as would justify occupying our pages with them. There are many of the moot points which do not require

answers in our pages, although they may very usefully form the subject of correspondence between articulated clerks. In fact, except in points of difficulty, correspondents ought not to wish to occupy our space, as that can be more usefully devoted to some of the matters waiting for insertion, such as the promised second series of works, by way of outlines of or introductions to standard text-books (Vol. 1, N. S., pp. 393, 394). It is also to be borne in mind that the correspondents are but a few of our subscribers, and that therefore the great majority of readers take but little interest in this part of the publication, and we know that most of these think it would be a great improvement if no answers were inserted. It therefore behoves us to be cautious, and to ask those who are anxious that their answers should appear to exert themselves to make them worthy of perusal, and thus endeavour to mitigate the objections of the dissentients. Besides which, this course will make the system itself more useful to those who practise it, by necessitating a deeper study of the points. We trust our correspondents will give these remarks their consideration, and be guided by them for the future, and we particularly wish them to understand that we do not discourage correspondence, but that it is our sincere desire to see it carried out more fully and more efficiently than has induced us to express the above views, and we feel satisfied that by strictly acting on them we shall be doing an essential service to those who will follow them out with perseverance and zeal.

The following is the revised list of correspondents above referred to, namely:—

Mr. W. W. Aldridge, T. Goater, Esq., solicitor, Southampton; Mr. E. Arnold, of Petworth; Mr. M. G. Booty, H. T. Robinson, Esq., Leyburn, Yorkshire; Mr. H. C. Browning, of Redditch, Worcestershire; Mr. F. A. Cole, Hales Owen, near Birmingham; Mr. G. Cousen, Wheatleys, Gomershall, near Leeds; Mr. J. G. B. Edwin, No. 99, Lisson-grove, Marylebone, London; Mr. S. J. Elliott, Trapezium-cottage, Southsea; Mr. T. D. Goodman, Messrs. Challinors, solicitors, Leek, Staffordshire; Mr. J. F. Halton, Messrs. Lowndes, Bateson, and Co., No. 3, Brunswick-street, Liverpool; Mr. F. Hartley, No. 15, Bankhouse-street, Burnley; Mr. J. Hind, G. Deverill, Esq., solicitor, Nottingham; Mr. C. Houghton, Messrs. Bickerstaff and Myers, solicitors, Preston; Mr. E. Hughes, No. 148, High-street, Woolwich; Mr. J. Ibberson, Church-street, Dewsbury; Mr. E. Johnson, Osbourne-street, Leek, Staffordshire; Mr. C. Jupp, 8, New-inn, London; Mr. C. Kirby, jun., C. Kirby, Esq., solicitor, Knaresborough; Mr. J. W. S. Lavender, solicitor, Bury-hall, Wolverley, near Birmingham; Mr. Michelmore, Exeter; Mr. C. M. Morris, Messrs. Lowndes, Bateson, and Co., No. 3, Brunswick-street, Liverpool; Mr. H. M. Ogle, the Gringrog, near Welchpool; Mr. S. S. Partridge, Messrs. Surr and Co. solicitors, 12, Abchurch-lane, London; Mr. J. F. Peacock, J. Cutts, Esq., solicitor, Chesterfield; Mr. C. Robinson, R. Robinson, Esq., Bedern Bank, Ripon; Mr. G. R. Rogerson, Messrs. Rogerson and Peacocks, solicitors, 4, Chapel-street, Liverpool; Mr. A. K. Rollett, 7, Lansdowne-terrace,

Hull; Mr. E. Shearm, Stratton, Cornwall; Mr. W. M. Sherring, 57, Great Russell-street, London; Mr. T. P. Tombs, S. Tombs, Esq., solicitor, Droitwich; Mr. S. W. Turner, Bank-street, Sheffield; Mr. J. Walker, Messrs. Challinor and Co., solicitors, Leek; Mr. E. A. Ward, Moat-house, Castle Bromwich, near Birmingham; Mr. F. J. Warner, Messrs. Warners, Winchester; Mr. W. Whitton, 22, Wood-street, Northampton; Mr. C. F. Wilson, R. Broatch, Esq., solicitor, Keswick.

If we have made any omissions from, or mistakes in, the above list, we shall be ready to make the requisite additions or alterations in the next number, when we hope to be able to announce some additional names from among our numerous subscribers; and, indeed, we rather think the ameliorations above proposed will induce many who have hitherto held back to come forward. It is to be borne in mind that it is not essential that the moot points should be sent to us before being discussed, but that any gentleman is at liberty to send direct to any other or others a question for discussion, though probably it will be more convenient, in general, to send it to us for circulation among the correspondents and insertion in the ensuing number.

During the last two months there have been so few moot points sent for insertion that we have not thought it worth while to send them round to the correspondents, more especially as we presumed that many would, on account of the holidays incident to the season, be unable or unwilling to attend to them; but, now that sterner duties demand the attention of the student, we trust we shall receive many more moot points, and we shall then take care to send them round as before.

We beg to call attention to the following matters, which may be useful to some who have recently become correspondents, and also induce others to have their names inserted in the lists of correspondents:—

1. Any one taking in the publication, either directly or through a book-seller, may have his name put down as a correspondent, provided he be either a solicitor or an articled clerk.

2. There is no payment to be made on having the name entered in the list, or at any other time or on any other occasion, beyond each correspondent prepaying any letters sent by him.

3. It is not obligatory on any one to answer the moot points sent to him, but such moot points should be forwarded to the correspondent whose name stands next at the foot of the printed moot points sent out by us.

4. It would much facilitate our labours if each answer to us for publication were written on a separate piece of paper, which might be of any size according to the length of the answer, and, if thought proper, might then be continued on the back. It would not cost more in postage, but would, at the same time, be a great convenience.

5. It would be a great improvement if moot points were sent up earlier in the month, as there would be more time for writing the answers, and it would save some little labour and expense to us, and to the correspondents.

6. There are great complaints made in several quarters, that so many answers are without references to authorities.

## ON THE LAW OF JUDGMENTS.

The law of judgments is just now in such a confused state that few practitioners are able to act with confidence in even ordinary matters, and we, therefore, think that a few observations on one or two points which have lately been matter of discussion in practice will be generally acceptable.

*Notice of an unregistered judgment—Leasehold interests.*—Most of our readers are aware that unregistered judgments have not now any effect against purchasers, mortgagees, or creditors, even though having notice thereof: this is by the 18 & 19 V. c. 15, s. 4; 1 L. C. 427, 428. Prior to this, indeed, the 3 & 4 V. c. 82 had provided that no judgment should, by virtue of the 1 & 2 V. c. 110, s. 19, affect any lands, at law or in equity, as to purchasers, &c., until registered, notwithstanding notice: this applied merely to the *additional* remedies given by the statute, and did not take away the rights which the execution creditor had prior to and independently of the statute, and, therefore, a non-registered docketed judgment with notice had some effect, but this is not now the case as to purchasers, &c. A point lately arose in practice, as to a past transaction, whether leaseholds were bound by an unregistered judgment, of which an intending purchaser had notice. On the one hand it was said that notice would, in equity, bind the leaseholds in the purchaser's hands, whilst on the other hand this was denied, and the effect of notice confined to freehold interests in lands, and for this view Sug. Vend. 540 was relied on, it being there (9th ed.) said, that "a judgment is at law no lien on a legal term," and again (p. 547) "judgments do not bind leasehold estates till writs of execution are taken out upon them, and delivered to the sheriff." And more specifically as to the power of notice (which was the matter relied on as making a difference between law and equity, and is, indeed, in general, very important to be kept in mind): "Therefore, although the judgment will not of itself bind the leasehold estate, yet the purchaser cannot safely complete his contract where he discovers a judgment [which, of course, means having express notice of it], because he cannot be satisfied that an execution issued upon it has not been lodged with the sheriff:" the reason here given precludes the notion that notice of the judgment would, in equity, fix the purchaser.

*Judgments binding leaseholds—Historical character of the law of judgments.*—We may here observe, that the many recent acts beginning with 1 & 2 V. c. 110, and ending (for the present) with 19 & 20 V. c. 97 (not including the late act as to re-registry of Crown debts, 1 L. C. N. S. 323, 328, 329), relating to the law of judgments, necessitates great care in reading reports and text-books, inasmuch as the doctrine of one period ceases to be that of another. Take an example from Sug. Vend. 10th ed. (vol. 2, p. 401), where it is said, "Leasehold estates are now bound in like manner as freeholds;" this was said in reference to the 1 & 2 V. c. 110, and is not correct with reference to the 2 & 3 V. c. 11, s. 5 (1 Jur. N. S. 86), by which a registered judgment without notice has the effect of binding a moiety of freeholds, but

not of leaseholds, as against a purchaser or mortgagee, it being provided that as against purchasers or mortgagees, *without notice*, no registered judgment shall bind or affect lands, &c., further or otherwise or more extensively in any respect, than a docketed judgment would, before the 1 & 2 V. c. 110, have bound such purchaser or mortgagee; and, as we have above stated, such a judgment did not bind leaseholds in any manner.

*Leaseholds in Middlesex, where judgment not registered in the local registry.*—According to Sng. Vend. 551, 9th ed., there is no necessity for registering judgments as to leaseholds in Middlesex; he, indeed, speaks of writs of execution, though the registry statutes refer to the judgment: "From the present practice of registering writs of execution it may perhaps be concluded that they ought to be registered; but the registry of them seems *casus omissus* out of the statutes for registry; and, therefore, upon the purchase of a leasehold estate in a register county, not only the register, but also the proper courts [*i. e.*, now the Common Pleas registry of judgments], should be searched." However, in the case of *Westbrook v. Blythe* (8 El. & Bl. 737; 1 Jur. N. S. 84), Lord Campbell said: "It is clear that such a leasehold as the plaintiff's [a term for ninety-nine years] is comprised within the act [Middlesex Registration Act, 7 Anne, c. 20, s. 18], as the only leaseholds excepted are by sec. 17, and they are leases at rack-rent, and leases not exceeding twenty-one years; whereas the present lease is not at rack-rent, and does exceed twenty-one years." And this decision was adhered to by the same court in *Hughes v. Lumley* (1 Jur. N. S. 424).

*Unregistered judgments in Middlesex, &c.—Rights of such judgment creditors*—*Parties to suits for redemption.*—Though not exactly within the scope of the present article, it may yet be useful to call attention to a decision by Lord Cranworth (whilst V. C.) in *Johnson v. Holdsworth* (15 Jur. 81), where it was held that subsequent judgment creditors, whose judgments are registered in the Common Pleas, but not in the county register (in this case Yorkshire), are not necessary parties to a suit for the foreclosure of lands within the register county. The judge admitted that a mortgagor, bringing his bill to redeem, is bound, for the security of the mortgagee, to bring before the court all parties who might call for redemption—that is to say, second mortgagees and subsequent incumbrancers; but he added: "In register counties an unregistered incumbrancer is not an incumbrancer either at law or in equity, though equity may give him the same rights as if he were an incumbrancer." Again, "It is said that, in equity, notice puts all parties in the same position as if their incumbrances had been registered; but I think that this is stating the proposition far too broadly. The rule of equity is where a purchaser has paid his money, with notice of an unregistered incumbrance, he shall not shelter himself behind an act [alluding to the County Registry Acts, the Common Pleas Registry Acts being different (see 18 & 19 V. c. 15, s. 4, referred to *supra*)] which was made to protect parties without notice"—*i. e.*, such is the construction put by the courts upon the County Register Acts. The above decision offers some curious points, but as Mr. Dart (Vend. 321, 3rd edit.) says V. C. Knight

Bruce (now L. J. in Court of Appeal) declined to follow this decision (*Robinson v. Woodward*, 4 De Gex & Sm. 562), though a similar decision has been since given in the case before alluded to of *Westbrook v. Blythe*.

*Robinson v. Woodward*—*Unregistered Middlesex judgment claiming priority over a subsequent duly registered mortgage*.—As we have referred to *Robinson v. Woodward* (4 De G. & S. 562), we may as well state what the case and decision were:—A creditor by judgment, registered in the Common Pleas, but not in Middlesex, by suit sought priority over a duly registered mortgage of a subsequent date, and to foreclose it. The court, having regard to the 2 & 3 Vic. c. 11, s. 5, in order to determine the priority, directed an issue whether the mortgagee had, at the date of his mortgage, actual notice of the judgment.

*Effect of judgments on leaseholds*.—We take, from the cases of *Westbrook v. Blyth* and *Hughes v. Lumley* (above referred to) the following propositions:—1. A docketed judgment before the 1 & 2 V. c. 110, did not bind leaseholds until an elegit was awarded (8 Co. Rep. 171 a.; 3 Atk. 739; 8 Sug. Vend. 335, 336, 10th edit.). 2. Therefore, a Common Pleas registered judgment does not bind leaseholds against a purchaser for value, without notice, until an elegit is awarded. 3. The necessity for registering judgments in Middlesex still remains, notwithstanding the Common Pleas Registry Acts. 4. For the two sets of statutes can be read together, and carried into effect, by holding that a judgment registered in the Common Pleas will have the effect of a charge upon land in Middlesex only from the time that the judgment has been also registered in the registry for Middlesex. [This proposition is a purely legal one, and must be limited by the equitable doctrine of notice.]

It will be borne in mind that leasehold interests are not only affected by an elegit, but may be, and now usually are, disposed of by the sheriff under a *feri facias*, as to which it is not our present purpose to point out any difference which may arise out of the peculiar doctrines applicable to each writ respectively, but we may call attention to the 19 & 20 V. c. 97, s. 1; 3 L. C. 89; 4 Id. 56.

*Searches for judgments*—*Difference between solicitors acting on their own judgment and on opinion of counsel*.—A solicitor taking on himself to limit searches for incumbrances, either by excluding some of such searches, or by curtailing the usual period, or by confining them to particular persons, necessarily runs some risk; and, though it is very common to do this, it is not the less foolish. It should never be done except on the advice of counsel, which advice should be in writing, and will furnish a justification to the solicitor, whatever may be the result of acting thereon, provided, of course, proper instructions were laid before counsel, including any special grounds requiring more than ordinary vigilance and strictness (see *Cooper v. Stevenson*, 16 Jur. 424; 21 L. J. Q. B. 292). Now it is very usual to limit searches for judgments to the actual vendor, and to carry this back only to the time of his purchase, however recently he may have acquired the property; and sometimes this is thoughtlessly done where he was not a



purchaser for a money consideration then advanced. Lord St. Leonards (Vend., p. 547, 9th edit.) says: "It is, I believe, usual to search for judgments against a vendor only from the time he purchased the estate; but this practice is not correct, because judgments bind after-purchased lands, and will consequently affect such lands even in the hands of a purchaser." The writer means a registered judgment with notice, as to the whole lands; a registered judgment, if freeholds, without notice: though practically in each case the result may be the same, by the operations of a judgment creditor exercised strictly, leaving, however, the right of contribution (see 1 Sug. Vend. 548, 9th edit.; 3 Co. Rep. 11 b., 14 b.; 1 Beat. 61). Since the establishment of the Common Pleas registry this limitation is less usual than formerly, as now the search is usually made for five years back from the time of searching. In the next place Mr. Dart (Vend. 318, 3rd edit.), after stating that in no case need a search for judgments in the Common Pleas registry extend back for more than five years, adds: "but the search for the five years preceding the purchase should be made, not only as against the present vendor, but also against former owners, although more than five years may have elapsed since they parted with the property." More specifically, Mr. Prideaux (Precéd. Conv. 79) says: "The search for judgments should be for five years in the Common Pleas, in the names of all those persons who have had interests in the property during the *preceding twenty years* down to the respective periods at which their interests in the property respectively ceased:" this latter part is not very intelligible, for a search during the five years preceding the actual purchase will certainly suffice. It is very common for the solicitor of a purchaser to search against the immediate vendor only; and where the vendor gave full value at the time of his purchase counsel almost always gives this advice, but where the consideration was a debt before incurred this advice should not be given, as it frequently happens that the creditor takes what he can get without being particular as to whether it is incumbered or not—it is to him, at least, a plank of the shipwrecked vessel; and much less should the solicitor take upon himself to limit the search under such circumstances. And even where the vendor gave full value at the time, it is not prudent for a solicitor to omit the full search without advice to that effect for he may be thereby incurring a great responsibility should his client be fixed with notice of an unsatisfied registered judgment against a prior owner, obtained against him during his ownership.

Most of our readers are aware that a bill is now in the Lords, having for its object to further amend the law of judgments; and we trust it may have the effect of simplifying it, though, with former experiences before us, we shall not be too sanguine on this head. We understand, that it is proposed to make it necessary to issue execution and register same in order to have the benefit of the registry acts, which will, we fear, have merely the effect of increasing the costs to the parties, without any corresponding benefit, though we shall be glad to learn that we are mistaken in this respect.

## Vendors and Purchasers.

**DEATH OF PURCHASER AFTER DECREE.**—*Order to revive—Specific performance of contract to purchase.*—In an ordinary administration suit, an order of revivor and supplement, under the 52nd section of the 15 & 16 V. c. 86, may be obtained as of course, with the addition that the personal representatives may admit assets on account (*Edwards v. Batley*, 19 Beav. 457). In a suit for specific performance, where the defendant, the purchaser, had been ordered to complete, the purchase money had been paid, and the conveyances delivered to the purchaser, and interest only on the purchase money, and costs remained due. The purchaser died, and the common order to revive was obtained, but his representatives refused to pay the interest. Thereupon, the vendor filed a new bill on behalf of himself and all the other creditors of the deceased, praying for payment, and if the defendant should not admit assets for an account: Held, that the simple order to revive was regular without any addition, the plaintiff having no reason to anticipate the necessity of filing a new bill. *Collard v. Roe*, 1 Law Tim. Rep. N. S. 87.

**SPECIFIC PERFORMANCE.**—*Sale by assignee in insolvency—Objections to title—Subsequent dealings with reversion by purchaser—Costs of official assignee.*—The following is a novel case, and the decision one of a doubtful character, and probably will not be upheld on appeal. It appeared that, under an order of the Insolvent Debtors' Court, the interest of the insolvent in certain freehold and copyhold premises was directed to be sold. In the particulars of sale the property was described as freehold and part copyhold. At the sale the defendant was declared the purchaser. He signed the contract and paid the purchase money. On the delivery of the abstract of title the defendant raised an objection whether the property was, by the dealings of the parties, to be treated as real or personal estate—in other words, whether the insolvent's interest was absolute in the land as money, or whether he was tenant by the curtesy only. The purchaser insisted on the objection, and afterwards rescinded the contract. After so doing he took from the heir-at-law of the wife, in consideration of £200, a conveyance by deed of his interest in the property subject to the insolvent's life estate. In this deed the defendant recited that the question of title was still pending between the vendors, the assignees in insolvency, and himself. The creditors' assignee in insolvency filed a bill for specific performance: Held, inasmuch as the objection was taken immediately after the delivery of the abstract, that there was no fraudulent misrepresentation on the part of the vendors: Held, further, that the recital in the deed rendered it impossible for the defendant to say that he had rescinded the contract: Held, also, that the conduct of the defendant in dealing with the reversioner was a violation of the duties which the contract created; and specific performance decreed with costs. The official assignee having refused to join with

the creditors' assignee as co-plaintiff, and having been made defendant, no order was made as to his costs (*Murrell v. Goodyear*, 1 L. T. N. S. 291). In his judgment, V. C. Stuart said: "The defendant, having entered into a contract with the plaintiff to purchase this estate, says he is not bound to complete that contract; in the first place, because there has been a fraudulent misrepresentation of title on the part of the plaintiff. It appears, from the evidence of the defendant, the purchaser himself, that, so far from there being any fraudulent misrepresentation of title, in the very earliest stage of the examination of the title the defendant, the purchaser, said that there was a question whether the property was in point of law to be considered as real or personal estate. He saw it was a doubtful title, and therefore his first requisition was, that the plaintiff, the vendor, should procure the heir-at-law to concur in the conveyance. That was a perfectly correct view on the part of the defendant, and it excludes all notion of any fraudulent misrepresentation. The case, therefore, is one in which the plaintiff, as vendor, had a doubtful title, the means of curing which were pointed out by the purchaser himself. There being, therefore, no fraudulent misrepresentation, the question is as to the second topic of defence on the part of the purchaser. The second ground of defence is, that he rescinded the contract, and, after rescinding the contract, he went and dealt with the heir-at-law, whose concurrence he needed, and bought from him a good bargain, to the benefit of which he claims to be entitled. The case as to the contract being rescinded is one which is answered by the conduct of the defendant himself; for, after first dealing with the heir-at-law, as he says himself, after rescinding the contract, he takes a conveyance from the heir-at-law, in which he recites the contract for purchase, and says that the said question of title was then pending between them—viz., the plaintiff and the defendant Sturgis, and the said Frederick Goodyear. Therefore the second ground of defence as to the contract being rescinded entirely fails. The case, therefore, is this, that the defendant is a purchaser who, having ascertained that there were doubts as to the title which required the concurrence of a third party, affects to endeavour to rescind the contract, and then goes on and deals with that third party, who, he thinks and is advised, has the title to the estate, as reversioner in fee. That is a mode of dealing which is in violation of those duties which the contract created. It will not be permitted by this court that a purchaser shall make use of the contract for a purpose prejudicial to the interests of the vendor. The court has gone so far in considering that the conscience of each of the contracting parties is bound, that even where a vendor has contracted to sell an estate to which he has no title at all, if, after entering into a contract to sell an estate which was not in him to sell, he, by dealing with the person really entitled to the estate, gains possession of the estate, the court fastens upon his conscience the obligation to fulfil the contract, although, at the time when the contract was entered into, he had not the means of doing that which he contracted and agreed to do. The court considers that, the vendor having obtained the means of completing his contract, and the power of conveying to the

purchaser what he contracted to sell to him, the purchaser by force of the original contract has a right to call upon the vendor to convey that fee-simple which he afterwards acquired. Mr. Bacon, in the course of his argument, has referred to that great text-book, Lord St. Leonards' treatise on Vendors and Purchasers, and has endeavoured to find there something to support his case. What he found there would have supported his case, if the purchaser had been dealing with a fraudulent vendor. But inasmuch as the case of a fraudulent vendor wholly fails, and ought never to have been set up, the passage to which the defendant should have himself referred is to be found at page 297, sec. 90, where Lord St. Leonards says: "If a man sell an estate to which he has no title, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser. This is said to be a personal equity attaching on the conscience of the party." In this case the defendant has done this wrong to the plaintiff, that he has endeavoured to use the contract for a purpose adverse to the interest of the vendor, the plaintiff, with whom he contracted; and he made it the means of enabling him to make a bargain for his own benefit. That bargain he cannot be allowed to retain, having obtained the concurrence of the heir-at-law behind the back of the vendor, and thus having cured the defective title which he at first set up. He must be allowed to retain the price he has paid to the heir-at-law, and the rest of the purchase money must be paid. The defendant must pay the costs of the suit.

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### CORRESPONDENCE ON MOOT POINTS.

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We beg to draw attention to the following communication, as it may be a means of facilitating what is so desirable, mutual correspondence on the moot points. We may add, that it would be much better if correspondents would send their answers to others, with a view to obtain their opinions on the correctness of such answers, and asking for the views of such correspondents. By these means the moot points would become both interesting and useful. It is, we think, folly to allow any feeling of false delicacy to intervene, and prevent the adoption of a very useful plan of acquiring practical skill in the profession, as well as improvement in other respects, which must be of great assistance when the pupil stage has ceased.—EDS.

SIRS,—There is one little difficulty attending the correspondence upon moot points which I wish to point out to you. At the beginning of the month you forward the list to A., say, containing half a dozen points. A., after choosing one or two, forwards the list to B., who is in difficulty, not knowing what points A. has agreed upon, and therefore does not write to A. to see whether his opinion coincides with his own; and thus the system is defeated, and no correspondence takes place.

To remedy this I wish you would, in the next CHRONICLE, ask each of the subscribers to mark with their initials the points they have taken into consideration, when B. will know what to write A. upon; and C., B.; and so to the end of the list.—Yours respectfully,  
J. H.

## Summary of Decisions.

### EQUITY AND CONVEYANCING.

**FEME COVERT.**—*Equity to a settlement*—*Whole fund* [see 1 L. C. N. S. 368].—The following is a decision to the effect that a wife is entitled to have the whole of a fund, and not merely a portion thereof, settled upon her (see 1 L. C. N. S. 388). The bankrupt's wife's property at the time of her marriage amounted to £460, of which £160 were settled upon herself, and the remainder was expended about the marriage or handed over to her husband. Subsequently to the bankruptcy she became entitled by the death of her brother to about £511 consols: Held, on the authority of *Re Welchman* (1 Giffard, 31; 33 L. T. R. 377; 1 L. C. N. S. 368), that she was entitled to the whole sum as against the assignees. *Ex parte Davidson*, 1 Law Tim. N. S. 277.

**INJUNCTION.**—*Watercourse*—*Action at law*—*Conveyancing*.—A defendant, against whom an injunction is prayed to be restrained from diverting a watercourse, has a right to have the alleged right of the plaintiff established by means of an action at law. The court will not grant such an injunction, in the meantime, where the balance of convenience or inconvenience in the attendant circumstances would be against the defendant's right to do the thing sought to be restrained. *William v. Heath*, 1 Law Tim. N. S. 267.

**LEASE.**—*Settlement*—*Power of leasing*—*Option of lessee to determine lease*.—A power in a marriage settlement to lease for twenty-one years was held to entitle the trustees to grant a lease for twenty-one years, determinable at the first seven or fourteen years, at the option of the lessee. *Edwards v. Millbank*, 29 Law Journ. Ch. 45.

**LUNACY.**—*Practice*—*Carriage of commission*.—The priority of petition for a commission de lunatico inquirendo gives a *prima facie* right to the carriage of it when issued. *Re Wood*, 29 Law Journ. Ch. 54.

**MORTGAGE.**—*Foreclosure*—*Death of one of two joint mortgagees before day fixed for payment of money*.—It is very seldom that foreclosure decrees are worked out properly, by reason of some event happening after the fixing of a time for payment of the mortgage-money, such as the receipt of a sum on account, or the death of one of the parties, &c. Where there has been a receipt of money after the time is fixed, but before the day of payment arrives, a new day for payment should be appointed; but it has been held in one case, that where the receipt was after the day for payment this was unnecessary, and this may be correct (*Constable v. Ho.*, 7 W. R. 160). In the following case it appeared that two joint mortgagees had obtained an order for the payment of the mortgage-money, but before the day fixed for the payment had arrived one of them died: it was held, that though the mortgagor did not attend to pay the money on the day fixed, a new order must be obtained by the sole surviving mortgagee for the appointment of a new day, on the arrival of which (and not before), in case of the mortgagor's

default, he will be entitled to an order for foreclosure absolute. *Kingsford v. Poile*, 8 W. R. 110.

**PUBLIC COMPANY.**—*Joint Stock Companies Act of 1848, 1856, and 1857*—*Contributory*—*Husband and wife*—*Married woman*—*Separate use*.—If a single woman be indebted, if she marries, *prima facie*, her liability devolves on her husband during the coverture, he by the marriage undertaking and becoming liable to her obligations. This rule applies to the ownership by the woman, prior to the marriage, of shares in a public company, but his liability, as a contributory, will not arise if the shares be settled on the marriage in such a manner that he never can have any benefit from such shares. A widow who derives shares in a banking company from her late husband, becomes a registered shareholder in respect of such shares, marries a second time, and by ante-nuptial settlement made on such second marriage agrees to transfer these shares to trustees, upon trust for herself for life for her separate use without power of anticipation, with remainder to her children by the first marriage. There is no formal notice of the settlement or marriage given to the bank, but there is evidence that they did, in fact, know of the marriage and of an intended settlement. The trustees of the settlement repudiate the trust, and neither execute the settlement nor act under it. The married woman gives a written order, assumed to be signed by her in her second husband's name, for payment of the dividends to him, and this is acted upon by the bank until it fails, and the name of the married woman, as originally on the list of shareholders (*viz.* that of her first husband), remains unaltered. On the question whether, on the winding up of the bank which is registered under the Joint Stock Companies Registration Act of 1856, either the husband or wife, or both, are liable: Held, that the husband is not, but that the wife is liable, and that her liability is confined to her separate estate. The act of 1856 takes the case of every company registered under it out of the operation of the act of 1848, does not define the word "contributory," but the 19 & 20 V. c. 49, by the 9th section, confines liability to those persons who at the date of the registry are the holders of shares. *Re Northumberland and Durham District Banking Co.*, 8 Week. Rep. 73.

**PUBLIC COMPANY.**—7 & 8 V. c. 110, s. 68—*Proceedings at law*—*Injunction refused*—*Jurisdiction*.—Where a creditor of a company, who was also a shareholder in it, took proceedings under the 7 & 8 V. c. 110, s. 68, against another individual shareholder in the same company to recover the whole of a debt due from the company, a court of equity refused an injunction to restrain such proceedings, considering that the judge at common law had full jurisdiction to deal with the case. *Hardinge v. Webster*, 1 Law Tim. N. S. 261.

**RESTRAINT OF TRADE.**—*Injunction*—*Medical practice*—*Effect of covenant in restraint of trade*—*Public policy*.—A covenant in restraint of trade, though contrary to public policy, will, according to V. C. Stuart, be enforced by a court of equity. G., a surgeon at the town of C., having engaged H. as his assistant, a deed was executed whereby H. covenanted,

among other things, that he would not at any time, after he should cease to act as the assistant of G., practise as a surgeon at the said town. And it was provided that H. might determine the engagement at a month's notice. H., after acting as G.'s assistant for some years, determined the engagement, and commenced practice as a surgeon at C. The court granted an injunction to restrain him. *Giles v. Hart*, 8 Week. Rep. 74.

**TRUSTEES.**—*Opinion or advice of court, &c.*—22 & 23 V. c. 35, s. 30 [1 L. C. N. S. 832].—The "opinion, advice, or direction" of a judge, permitted to be taken under the above act, should be taken rather upon petition with the assistance of counsel, than upon summons in chambers. *Re Dennis*, 1 Law Tim. N. S. 158.

#### EQUITY PRACTICE.

**LUNACY.**—*Carriage of commission—Claim of wife to preference.*—The wife of a lunatic has no preference over his children in the carriage of a commission. Each case must stand on its own circumstances; but the petition which is first presented has, *prima facie*, the best claim. *Re Wood*, 8 Week. Rep. 70.

**PUBLIC COMPANY.**—*Costs—Lands Clauses Consolidation Act* [1 L. C. N. S. 129, 152].—*Costs of adverse litigation.*—The following case is one of some practical importance in regard to railway companies and their liability to costs under sec. 80 of the Lands Clauses Consolidation Act, 1849, by which the Court of Chancery may direct the company to pay the costs, among other things, of the orders for payment out of court, of the principal of the moneys, or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants. A sum of money having been paid into court by a railway company as the purchase money of land, a petition was presented to pay it out of court to the parties interested. A contest existing between the parties as to the shares in which they were entitled to the fund, they appeared by separate counsel, and argued the point on the petition. In making the order as to the payment of costs by the company, Stuart, V. C., refused to insert the usual exception of the costs (if any) occasioned by litigation between adverse claimants: Held, by the Lords Justices, on appeal, that the exception ought not to have been omitted, but without prejudice to the course which the taxing master might take when the case came before him. The usual form of order sanctioned by the practice of the court ought not to be departed from except in very clear cases. The words "such as are occasioned by litigation" in the 80th section of the Lands Clauses Consolidation Act refer to "costs" not to "proceedings." *Re Cant*, 8 Week. Rep. 105.

#### COMMON LAW.

**ANNUITY.**—*Memorial—Part loan paid back—Usury—Policy of assurance as collateral security.*—The following case turns on a repealed statute (F. Bk. 213; 17 & 18 V. c. 90; 1 L. C. 150). In the memorial of the

grant of an annuity, the names of two of the parties were by mistake repeated among the names of the witnesses to the deed: Held, not to invalidate the memorial where part of the money lent had been paid back to the attorney of the lender of the money as a procuration fee: Held, that it is no objection to an action upon the deed, but the question must be raised by motion to set aside the deed. Where an annuity is secured upon land, and the principal is secured by a policy of insurance: Held, that it is not a shift or continuance within the meaning of stat. 12 Anne, c. 16, s. 2. *Hawkins v Bennie*, 1 Law Tim. N. S. 297.

**BILL OF EXCHANGE.**—*Stamp of wrong denomination*—*Bill drawn on receipt stamp*.—After the passing of the 16 & 17. V. c. 59, providing for a uniform receipt stamp of one penny for all sums, the drawer of a bill for £25 drew it on an old threepenny receipt stamp. Subsequently, the commissioners of Inland Revenue affixed a proper bill stamp, under the authority of the 37 G. 3 136, s. 5, which enables them, upon payment of a penalty, to stamp bills which have been drawn upon stamps of a proper value, but of a wrong denomination: Held, that the commissioners had power to stamp the bill, and that it was receivable in evidence. *Haiser v. Grout*, 8 Week. Rep. 79.

#### PROBATE AND DIVORCE.

**COSTS.**—*Out of estate*—*Difficult points of law*.—Where, in opposition to a will, the defendant relies upon difficult points of law, he will, though unsuccessful, be generally entitled to his costs out of the estate. *Robins v. Paxton*, 1 Law Tim. N. S. 306.

**ADMINISTRATION.**—*Married woman sole next of kin*—*Application of creditor*—*Husband's rights to administration*.—The husband is entitled to take out administration in right of the wife, to her next of kin deceased intestate, and her renunciation in favour of a third person—*e. g.*, a creditor of the deceased, will not deprive the husband of his rights. *Semble*, a creditor applying for administration has no right to go into the question of the unfitness of the next of kin to administer. *Haynes v. Matthews*, 8 Week. Rep. 76.

#### COMMON LAW PRACTICE.

**COSTS.**—*Allowance of by master*—*Between party and party*—*Discontinuance before giving notice of trial*.—Where a plaintiff discontinues not having given notice of trial, the defendant is not, under any circumstances, entitled to the costs of the drafts, or copies of, the briefs, or instructions for briefs. *Cooper v. Boles*, 1 Law Tim. N. S. 202.

**OUTLAWRY.**—*Effect of*—*Interlocutory application*.—It is clearly established, that a man outlawed cannot maintain any action, for by his contumacy he is out of the sovereign's protection, and shall have no privilege or benefit from that law of which he is a violator, and to which he refuses to be amenable. In *Aldridge v. Buller* (2 M. & W. 412) Lord Abinger, C. B., said: "The principle is clearly laid down in the authorities, that an outlaw cannot appear in court for any purpose but to revise his outlawry."



In accordance with these principles, V. C. Wood has held, that the court will not entertain any interlocutory application in a suit by a plaintiff who has been outlawed since answer put in, although at the time of giving notice of such application the process of outlawry was not actually complete. *Knowles v. Rhydyfedded Colliery Company*, 8 Week. Rep. 75.

**WRIT OF SUMMONS.**—*Service—Enclosing copy in letter to defendant at a club—Leave to proceed as if personal service had been effected*—C. L. P. Act, 1852, s. 27.—A plaintiff should make proper exertions to serve a defendant at his lodgings or residence, or at least, endeavour to find out where the defendant lives. Where the writ was enclosed in a letter directed to defendant at his club, the court refused leave to proceed as if personal service had been effected, though it appeared that the letter and its contents reached the defendant, and he admitted the fact in a letter which he subsequently addressed to the plaintiff's attorney. *Davies v. Westmacott*, 1 Law Tim. N. S. 297.

#### BANKRUPTCY AND INSOLVENCY.

**ARRANGEMENTS** [1 L. C. N. S. 191, 220, 311].—*Deed of arrangement—Act of bankruptcy—Acquiescence.*—The following is an important decision with reference to the effect of a trader executing a deed of arrangement, and may lead to some alteration in the ordinary mode of proceeding in such a case. It has been held that the execution by a trader of a deed of arrangement with his creditors, though intended to be signed by six-sevenths of the creditors, and professing to be made under the arrangement clauses of the Bankrupt Law Consolidation Act, is an act of bankruptcy, and may be taken advantage of as such by a creditor before it has been signed by the requisite majority of the creditors. But if the creditor, though he has not signed the deed, has in any way assented to it, he will be precluded from taking advantage of it, and petitioning for an adjudication of bankruptcy. *Alsop v. Rees*, 3 Week. Rep. 106.

**FUTURE ACQUIRED PROPERTY.**—*Over and above existing liabilities and maintenance.*—Unless an insolvent at any period subsequent to his discharge shall appear to be in possession of property over and above what is sufficient to discharge his existing liabilities, and maintain himself and his family, the Court does not touch future acquired property. *Re Naylor*, 1 Law Tim. N. S. 309.

**PROTECTION.**—*Setting aside income.*—Where it appears that a petitioner can spare a portion of his income, the Court will require it as the condition of protection. *Re Blakesley*, 1 Law Tim. N. S. 170.

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### Moot Points.

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#### No. 7.—*Stoppage in Transitu.*

B. sold a quantity of manufactured goods to A. By the terms of sale they were to be trucked to X. railway station. On the day they reached

their destination, A. examined them as they stood in the truck, and wrote to B. acknowledging their safe arrival; but they were not removed from the railway station or from the truck, or any further dealt with by A. In the course of three days A. became a bankrupt. Can B. stop in transitu?

E. J.

No. 8.—*Ante-nuptial Assignment—Breach of Promise.*

A. (a lady) and B. are engaged to be married. Can A., after such engagement, settle her property without the consent of B.? And if A. made a settlement, in consequence of which B. refused to marry her, and A. then brought her action for breach of promise, could B. plead the settlement in bar of the action? Would the validity of such a settlement be affected after the marriage by the fact of B.'s knowledge or ignorance of its existence previous to his marriage?

E. J.

No. 9.—*Injunction—Moving for before appearance—Notice.*

A defendant has been served with a copy of a bill in Chancery, praying an injunction. He has not appeared thereto; and his time for so doing not having expired, the plaintiffs served him with notice of a motion for an injunction, without having obtained leave of the court so to do. Was this regular?

Eds.

No. 10.—*Injunction—Demurrer.*

A plaintiff to a bill in Chancery gives notice of motion for a special injunction; before the day for which the notice is given, the defendant puts in a demurrer. What is the effect of the demurrer on the motion? Suppose the parties to have agreed to argue the demurrer *instanter*—i. e., on the motion coming on—and the judge overruled the demurrer, would that affect the defendant's right to oppose the injunction, or would it not issue as a matter of course?

Eds.

No. 11.—*Bill of Exchange not Payable to Bearer or Order.*

In *Princ. Com. L.* p. 86, it is stated that the payee of a bill, if the bill be payable to him, without any other words, may transfer the bill to any stranger by merely delivering it into the hands of such stranger; whilst in *Smith's Hand-book on Bills*, it is stated that if a bill be not payable either to bearer or to the payee's order, it is of no use to any one but the original payee. Are either of these statements correct? 1. Suppose the payee of a bill not payable to bearer or order to indorse it to a stranger, what would be the effect; 2. Suppose him deliver to it to the stranger without any indorsement, what would be the effect? In each case assume a consideration, either 1. past, or 2. arising out of the transaction—i. e., either a prior debt or an advance made at the time of the endorsement or delivery of the bill.

Eds.

No. 12.—*Executor taking Residue.*

A testator by a very recent will gave certain pecuniary legacies but made no disposition of his residuary personal estate, and appointed A. and B.

executors of his will. He had no next-of-kin. Will the executors be entitled to such residue for their own benefit, notwithstanding the 1 W. 4, c. 40, or will they be trustees for the crown? Eds.

No. 13.—*Agreement by Letters—Stamp.*

It is stated in a publication containing a list of stamps, that if an agreement be made out from letters, one of the letters must be stamped with a 85s. stamp. Is this correct in any case, and if so, in what case would it not be necessary? See 7 V. c. 21, and 13 & 14 V. c. 97; Com. L. Princ. 182, 188. Eds.

No. 14.—*Plea of Purchase for Value—Answer.*

A defendant puts in a plea of purchase for value, and does not accompany it with an answer. Can the plaintiff take any, and what, objection, and how? Though the books state that the plea must be accompanied by an answer, is there not room to contend that this is not so now, and why? Eds.

No. 15.—*Arson.*

A child under seven years of age sets fire to a building, which is destroyed. Are the parents liable for damages, and if not, is the child subject to any, and what, punishment? C. R.

No. 16.—*Statutory Declarations.*

Can any of your correspondents inform me by what authority commissioners to administer oaths in Chancery alone take declarations, under 5 & 6 W. 4, c. 62, s. 18? Does not that section authorise commissioners of common law courts to take them likewise? To what period does the word "*now*" in the 18th section refer. J. H.

No. 17.—*Dower and Curtesy—Cesser, &c.*

As a general rule, will dower and curtesy cease on the determination of an estate by a conditional limitation, or an executory devise?

JOHN W. S. LAVENDER.

No. 18.—*Alien, Wife of, suing in this Country during War.*

"An alien friend, though resident abroad, is entitled to sue in the courts at Westminster for a libel published concerning him in England. But an alien enemy cannot sue upon a contract made before the commencement of hostilities, until the hostilities have ceased. The wife of an alien enemy may be sued as a *feme sole*" (see F. Bk. p. 68, and cases and authorities there referred to). *Quære*, whether the wife of an alien can sue in this country during war, where the wife was an Englishwoman, and married the alien? JOHN W. S. LAVENDER.

## Answers to Moot Points.

No. 153.—*Devise on attaining Twenty-one—Vested Estate* (Vol. 1, N. S., pp. 384, 402; *ante*, p. 30).

I think it will be seen, on reflection, that none of the cases cited by your correspondents T. O. X. and J. W. are in point, as they all mention a particular estate determinable on the same event on which the ulterior estate is limited to take effect, while in the moot point no such particular estate is named. For the present, therefore, I see no reason for retracting my first opinion. I shall, however, be glad to see further light thrown on the point.

CAUSIDICUS.

No. 7.—*Stoppage in Transitu* (*ante*, p. 68).

I am of opinion that A.'s examination of the goods as they stood in the truck on the day they reached their destination, and his writing to the vendor, acknowledging their safe arrival, would be held to be an intention on his part to take possession, and by such acts would be considered to have taken constructive possession of them, and that B., under the circumstances, could not stop the goods in transitu. Baron Parke, in *Whitehead v. Anderson* (9 M. & W. 534), said in such cases "the whole, in truth, depends on the intention of the vendee."

FRANCIS HARTLEY.

No. 7.—*Stoppage in Transitu* (*ante*, p. 68).

As the goods had reached their destination, I think B. cannot stop in transitu, A. having virtually taken possession of them (*Archb. on Bankr.* by J. Flather, p. 203).

E. S.

No. 7.—*Stoppage in Transitu* (*ante*, p. 68).

As a general rule, the transitus in goods continues until there has been an actual delivery to the vendee, but there may be a sufficient delivery by construction of law to determine the transitus, and divest the vendor of his right of stopping the goods without their coming to the corporal touch of the buyer (4 Esp. Rep. 82), and it was held in *Hurry v. Mangles* (1 Camp. 452), that if goods, after being sold, and beyond the period at which they ought to have been delivered, remain in the vendor's warehouse, and the vendor receives rent for the same, the right of stoppage in transitu is divested.

In the present case they were actually examined by A., and their safe arrival acknowledged, and there lay at the railway station (beyond the period they ought to have been delivered in) at the risk of A., and, of course, he would have to pay for allowing the goods to remain. Taking the above cases into consideration, I am of opinion that B. cannot stop in transitu (see 4 Camp. 287; *Chitty's Commercial Law*, vol. 3, p. 340).

J. H.

No. 7.—*Stoppage in Transitu* (*ante*, p. 68).

In Selwyn's *Nisi Prius*, 4th ed., vol. 2, pp. 1184, 1185, there is this statement, "where goods have so far gotten to their journey's end that they

wait for new orders from purchaser to put them again in motion, to communicate to them another substantive destination, and if without such orders they would continue stationary, right of stoppage in transitu is gone" (see also *Heinekey v. Eurlle*, 4 Jur. N. S. 848; *Harrison's Digest* by Fisher (for 1858), p. 190; *Dodson v. Wentworth*, 5 Scott, N. S., 821; S. C., *Analytical Digest*, pt. 4 (for 1843), p. 185). I am, therefore, of opinion, from the above statement and the authorities cited, that B. cannot stop in transitu under the circumstances stated in the moot point. C. R.

No. 12.—*Executor taking Residue* (*ante*, p. 69).

If there is no intention to the contrary on the face of the will, the executors will be entitled to the residue as against the Crown (*Russell v. Cl.*, 2 Coll. 648; *Taylor v. Ha.*, 14 Sim. 8). J. II.

No. 12.—*Executor taking Residue* (*ante*, p. 69).

I am of opinion, though I am unable to find any case in point, that the executors in this case would be entitled to the residue notwithstanding (1 W. 4, c. 40), and especially as there were no next of kin (see *Matthews' Executors and Administrators*, 2nd ed., pp. 211, 212). C. R.

No. 13.—*Agreement by Letters—Stamp* (*ante*, p. 69).

Where an agreement consists of several letters it is sufficient to stamp one (*Stead v. Li.*, 1 Bing. 196) with a 35s. stamp, although on the part of one of the contracting parties, the letters are written and signed by an agent (*Grant v. Ma.*, 15 M. & W. 737; *Harrison's Digest* (for 1847), p. 182). I am of opinion that this is correct in some cases, though it must depend on the amount of the consideration. C. R.

## Debating Societies.

### BIRMINGHAM LAW STUDENTS' SOCIETY.

#### *Moot Point*, No. 274.

Is a claim to dower of a widow, married before January 1st, 1834, liable to be defeated by a bona fide purchaser for a valuable consideration, having possession of the deeds of an attendant term, without an actual assignment of the term? (*Maundrell v. Ma.*, 7 Ves. 567; 10 Ves. 246; *Frere v. Mo.*, 8 Pri. 475; *Bass v. We.*, 12 Jur. 347).

The meeting decided in favour of the negative.

#### *Moot Point*, No. 275.

Is a person who administers a deleterious drug to another without his consent guilty of an assault at common law? (*Reg. v. Di.*, 3 Mau. and Selw. 11; *Reg. v. Bu.*, 3 Carr. and P. 660; *Reg. v. Di.*, 2 Moo. and R. 531; *Reg. v. Ha.*, 2 Carr. and K. 912; 23 Jur. 352).

It was decided that the case could hardly be said to come within the meaning of an assault as defined by some of our most eminent criminal authorities; and, notwithstanding the very able reasoning of the *Jurist*, the meeting were of opinion that, until the case of *Reg. v. Hanson* was overruled, the negative must prevail. JOSEPH ANSELL, jun., *Cor. Sec.*

## Notices of New Books.

### HORSEY'S LAW OF PROPERTY ACT.

*The Law of Property and Trustees Relief Act, 1859 (22 & 23 V. c. 35), with Notes.* By GEORGE HORSEY, Esq., of Gray's-inn, Barrister-at-law; *Lecturer's Prizeman, 1849, 2s. 6d.* London: Shaw & Sons.

Lord St. Leonards' Act of last session has given rise to numerous commentaries thereon, and it would appear from the reports that we are likely to have a goodly crop of decisions before the construction to be put on some of its enactments is settled. Independently of the point about Investments in the New Indian Loan, and on extra-English Securities, there have been decisions as to the retrospective operation of some of the clauses, and on the provision giving relief where there has been a breach of a covenant to insure. It is, indeed, a statute provoking comment, and so may be considered as properly calling forth the tribe of commentators as naturally as a battle-field attracts birds of evil omen. Whether the former class of bipeds have done their business as cleverly as the latter would, may be open to doubt, but at least some dust has been raised, though not possibly of a very auriferous character. We have before called attention to the work of one commentator, Mr. Hunter, and we have now to notice that of another, Mr. Horsey, so well known for his edition of Cornish on Purchase Deeds, for his works on the Trustee Act, and on the Probate and Administration Act. Mr. Horsey's experience as a conveyancing and equity counsel of considerable practice has fully qualified him for the office of commentator on the Law of Property Act, and the profession will therefore, no doubt, be glad to have his views thereon. Before proceeding to notice the provisions of the act, Mr. Horsey makes some observations on the now common course of legislation, observing of the act in question, that it is not, though an important act, a satisfactory mode of amending the law. The principal reason is, that it is not complete, nor even an attempt at completeness of design. It finds—as it were, picks up at random—a few of the matters which at one time caused impediments in legal transactions, and which were ultimately got rid of by scientific or circuitous conveyancing. They appear to be some—we think they can be but a few—of equally remediable defects in our legal forms which Lord St. Leonards has raked up from a vast store of legal valuables. But is that the province of legislature, or rather is it the fulness of its duties to society? A learned lord strings together a few antiquated snares in conveyancing, and presents them to the House, and the House passes a bill to remove them. So far as the removal of these matters goes it is well enough, but we complain that it is too trivial to justify such acts. Let there be one act, or a series of acts, which shall, if it be worth while, select all those numerous matters which worry lawyers and terrify clients, and that are of no earthly use except to induce carefulness to avoid them, and inflame bills of costs by

the mode in which they are avoided. Every conveyancer could proffer a dozen or more different matters, each as worthy of a place in the act as any that appears there. Had they been invited to furnish to the House a memorandum of such matters as were mere traps in the professional path and destitute of utility, we are sure there might have been such a removal of them as should have acted like oil to machinery, and the working of the legal machine have been wonderfully accelerated and cheapened. The act is, however, aimed at such of these matters as rose to the surface of one learned lord's recollection, and which he embodied in a bill, and which the House of Lords has passed, and the legislative estates combined have made an act. Mr. Horsey then proceeds to give a short statement of the principal provisions of the act, after which we have the act accompanied by full notes to each section, and finally the act by itself, with an index to the whole work. We should have been glad to have laid before our readers many of Mr. Horsey's notes, but we think we should be doing him injustice, because we really feel tempted to take the greater part of them; we must, however, confine ourselves to the following. The first extract relates to the clause of the act respecting the apportionment of conditions of re-entry, respecting which Mr. Horsey says:—"The technical nature of the law of landlord and tenant is nowhere so well shown as in the matter of the 'reversion.' If the lessor of five acres conveyed away three acres or any other portion, it followed as a consequence that the benefit of any condition in the lease, the unity of which was so earnestly maintained, was lost both to himself as to the part he retained, and to the assignee who had acquired the other part. This was a common law consequence of a right of entry not being able to be reserved to any but the lessor, his heirs, or executors or administrators, according to the tenure of the demised property. As it could not be granted by a direct mode, so neither could it be acquired by assignment. The assignee could not have a right to re-enter because he was not the lessor, nor his heirs or executors. Neither could the lessor, after assignment, have such right, because he had no longer any estate in the land. As every condition must defeat the estate in its entirety, and could not be partially resumed, leaving the remainder outstanding, so a condition could not be so framed as to make one and the same estate in lands cease as to one person and remain as to another, or cease for one time and revive afterwards. Nor could it become void as to one part of the land and remain as to the other. Thus in the case put (*supra*), of a lessor of five acres granting away the reversion in three acres, neither he nor his assignee could enter for condition broken; for he that does so must be in of his old estate, which no longer remained when he had parted with a portion. An exception to this was by act of law—the case of a lease comprising lands held of different tenures and descending to different heirs, &c. In such case the reversion, rent, and condition were divisible.

"The statute of Hen. 8, c. 34, although it placed assignees of the reversion in the place of the grantor as to all conditions which were incident to

for the benefit of the reversion, did not apply to the case of an assignee or grantee of part of the reversion whose rights still remained in the crippled state in which the common law left them.

"To derive advantage from this statute of Henry, the person claiming must have the reversion in the whole of the demised lands, though he need not have the whole of the reversion. 'As if lessee for years be, and the reversion be granted for years, the grantee for years shall take benefit of the condition' (4 Co. Litt. 215, a.). Here the grantee, though but of a portion of the reversion, as to time of its continuance, has the entirety of the lands, and the tenant will not be vexed by any other. But if the reversion be granted even in its entirety as to time, but in a portion only of the lands, the case remains as at the common law; and as the tenant might by such a grant be vexed by two persons, so he shall be troubled by neither, and for the reason expressed at the head of this note.

"This state of things is desired to be remedied by section 4 of the Act of Victoria; the root of the evil being called a 'severed reversion.' Perhaps, technically, this is only the case when one of several lessors grants his reversion; but it no doubt will include the equally frequent occurrence of a sole lessor granting his reversion to several, or a portion of the lands to one, retaining the residue himself. As a preliminary to the benefit given by the act, the rent must be legally apportioned. The apportionment of rent as regards the lessor was only in two ways: by act of law and by act of the parties. By act of law, as where lands of different tenures, *e.g.*, freehold and gavelkind, freehold and borough English, freeholds and copyholds, and freehold and leasehold, are jointly leased at an entire rent, and then the lessor dies, and the lands descend to or devolve upon different persons. Here an apportionment of rent is made by the law in order to suit the state of things produced by the law itself, as distinguished from the events produced by the mere act of the parties themselves. Apportionment by act of the parties needs little remark; it is either by an attornment of the tenant to the new owner of the reversion, or by an agreement to hold at an apportioned rent.

"Apportionment also takes place where there is a surrender of part of the demised lands to the lessor who accepts the surrender. The consequence of every apportionment by the act of the parties was, that it destroyed all conditions, so that re-entry was impossible. The entire and indivisible nature of conditions was the reason assigned for such a result. An apportionment by act of law did not produce this inconvenient result, for then the reversion, rent, and condition, although divided, yet retained all their incidents and virtues to the extent, of course, of the portion of the lands to which they were applicable by the apportionment.

"The completion of the apportionment, as well when it was the act of the law as where it arose by act of the parties, was an action against the tenant to fix the rent, unless the parties could agree upon it.

"When the rent is thus apportioned, the act applies. The terms of it require attention, as it does not appear that the benefit given to the owner



of a severed reversion is the same *pro tanto* as of the original lessor, or in fact of an owner of a reversion severed by act of law, in which case, as we have seen, the 'reversion, rent, and condition' are enjoyed in their divided state. The act gives the assignee of each part of the reversion the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him in respect of the apportioned rent allotted or belonging to him. This seems a great qualification of the rights under conditions on apportioned leases. Conditions of re-entry are generally operative upon non-performance or non-observance of any of the covenants, whether they be for rent, or repairing, or mode of using the property; but the present act seems to restrain the condition in its divided enjoyment to a re-entry for non-payment of rent. Now as a re-entry for non-payment of rent is always regarded as a penalty, and relievable even at law by payment of the amount actually due, there is little advantage to the assignee of the reversion from the act. Most re-entries are made in respect of breaches of covenant to repair, or the like, and these are not included by the words of the act.

"This ends our reading of the division of the act, title 'Leases,' merely adding in this place that section 9 (*post*), enacts that its eight preceding provisions, and therefore the sections already annotated, are applicable to leases for years or on lives."

With respect to the clause protecting a purchaser against forfeiture under a covenant for insurance against fire, Mr. Horsey says:—"As facilitating the safety of *bonâ fide* purchasers, and the disposal of leasehold property, this section is an improvement on the existing law. As is well known, a purchaser was always liable for any anterior breach in the covenant to insure, however good and perfect may have been the evidence before him of the existing insurance. Unless he required the production of and scrutinised all the receipts and policies from the creation of the lease downwards, he could never be sure that the insurance covenant had been performed. There must be a chain of policies and receipts, and, as in other chains, the strength is only that of its weakest link; so if there were a receipt defective in its date, or what would be as bad, any defect in compliance with the conditions of the policy itself, the covenant was broken and forfeiture induced, wholly regardless of years of subsequently good policies, payments, and performances. Now, under the act, a purchaser is to inquire after and see two things:—First, the receipt for rent last accrued due; and, secondly, a subsisting policy, agreeably to the covenant on that head, with proper receipt for last premium. When he has done this he is free from the defect or weakness of any link higher up in the insurance chain, and may hold on by the subsequent sound parts. There must be, however, an absence of notice on his part of any earlier defect in insurance. This seems an almost unnecessary clog on a good enactment; but there it is, and we can only suggest that on a purchase of a leasehold the purchaser should make no inquiry about

policies earlier than the one produced, and that the vendor should, if any such inquiry be made, stop it in limine by positively refusing to answer it. We think a court of equity could not compel him to disclose what could only do the purchaser harm by the disclosure. The unknown fact of a previous irregular insurance would be harmless to him under the act."

As to the section relating to assignments of personal estate by a person to himself and others, Mr. Horsey observes:—"The application of this section will be principally useful in the case of trusts comprising leaseholds and other personal estate not being stock.

"The application of the act will be best shown by stating the circumstances calling for it. They may be as follows:—Trustees of a settlement or of a will drop off by death. New trustees are desired to be appointed by the surviving trustee. The property may comprise freeholds, leaseholds, and stock in the funds. As to the freeholds, the mode of getting them vested in the old and new trustees jointly was scientific and easy. F., the old trustee, who desired to add G. and H. as trustees with him, could convey to G. and his heirs, to the use of F., G., and H., and their heirs, and the object was attained in a simple and lawyer-like way. There are other modes of doing it, but none so neat as the above. The statute of uses executes the use, and F., G., and H. are invested jointly with the inheritance as surely as if originally appointed.

"As to the stock there was little difficulty. By some process, known only to stockbrokers and the bank, the instructions to transfer the fund from F. to F., G., and H. would be found accomplished. As they know not of the statute of uses in Threadneedle-street, and, if they did, could not apply it, we suppose they take some absurdly short common sense view of the matter, and, despite the solemn rule that a man cannot assign to himself, allow F. to transfer directly to F., G., and H. Very convenient, no doubt, but all very heterodox and wrong.

"The leaseholds are left to the lawyers, and before attempting to get the matter brought about, recourse is had to the law books. Lewin on Trusts will do; and at p. 466, 2nd ed., he tells us:—'Should the trust estate consist of money in the funds, the stock may be transferred into the joint names of the old and intended new trustees.' How this is done the learned author does not say. Probably he thought it was managed in such an inartificial mode by the wise men in the East as to be beneath a lawyer's notice. However, as might be expected, the process creates no precedent westward, for he proceeds: 'If the trust estate consist of chattels real the parties cannot effectuate their object but at the trouble and expense of two deeds.'

"This is the formula:—F., the old trustee, by one deed assigns the leaseholds to X. upon trust to assign them to F., G., and H., and X. does accordingly by another deed assign it to F., G., and H. Although in principle this was the correct and only mode, yet there never was occasion for two deeds distinct as to parchment, and cumulative as to stamps. The

two deeds could have been comprised by the medium of double testatums on one skin and under one stamp. F. could assign to X. upon trust as above, and X. by a second testatum and assignment, could transfer to F., G., and H. That this would have sufficed is clear from the rule drawn from Digge's case (Coke, 174, b.), that 'the law will adjudge priority of the operation of one and the same deed, although it be sealed and delivered at one and the same instant.' Lord St. Leonards, citing this case, says (Pow. 210, ed. N. 5): 'Nor is this the only case in which the law adjudges priority in distinct parts of one and the same deed. It is upon this principle that a lease and release by the same deed has been several times ruled to be a good conveyance; for priority shall be supposed.' Upon authority the case was clear. To test it in practice the writer settled a transfer of leaseholds from an old trustee to himself and others by one instrument. It contained two testatums; and in fact cutting off the head and tail piece of deed number two it was bodily appended to deed number one. As so settled it was laid before one of our ablest conveyancers, and his opinion being asked, he wrote: 'Although I am disposed to agree with Mr. Horsey, that on principle the operations of the assignment and reassignment would be consecutive in the order requisite to effectuate the intention, yet I think that in the actual state of the authorities and practice the mode of passing the instrument is too experimental, and not wise economy.' After this opinion, itself an authority against the practical utility of the plan, the Legislature was the only help, and we have it in the section before us. In the case put F. will directly assign to F., G., and H., and they will become joint tenants of the property assigned."

We have already marked more for extract than we are perhaps justified in doing, and yet we must give one other, on account of the novelty of Mr. Horsey's views, and the important results which will follow if he be correct in his construction of the clause in question, which is, that providing that persons shall not be bound to see to the application of their purchase or mortgage money. The section is about the shortest in the act, and is apparently framed in the simplest form, and yet Mr. Horsey gravely assures his readers that it leaves matters just where they were before the act was passed, a result so incredible that our readers will, we are sure, require some strong arguments to induce them to coincide with the learned commentator. Mr. Horsey assumes that the Legislature refers to payments to trustees according to the views of courts of equity, and not according to the views of courts of law. It is well established at law that payment to trustees is a good discharge, and, indeed, that payment to and receipt by one trustee is a good discharge as to both (*Husband v. Davis*, 10 C. B. 645). What, therefore, more natural than to suppose that the Legislature was referring to this doctrine, and intended to put an end to the difference existing between the courts of law and of equity. However, listen to Mr. Horsey, who, after setting out sec. 23, says:—"What this clause may effect it is difficult to say. Not until the courts shall determine whether it has any, and if any, what effect, will the profession or the public derive

any advantage from it. What does it say? If you pay any person to whom trust money is payable, you are discharged from seeing to the application of such money. Was it ever otherwise? If the person receiving the money were the proper person to receive it, were you ever bound to see to the application of it? How could it be otherwise? Paying a trustee, how could you follow him about and see what he did with the money? As we understand the law of trustees' receipts it was simply this:—Whenever, according to the express or implied nature of the trust, money was to be placed in the trustee's hands, a payment to him was necessarily a sufficient discharge. Seeing to the application of such money was simply nonsense, because it was manifestly impossible. The difficulty always was in ascertaining whether the money was payable to the trustee or whether to the cestui que trust. When once it was seen that the trustee had to perform active duties with the money, *ultra* the payment of it to the cestui que trust, then the trustee could receive the money, and, of course, necessarily give a discharge for it.

"The whole subject is put clearly by Dart, V. & P. c. 18, s. 3. We think we sum up the whole by stating as the rule, that whenever duties had to be performed by the trustee, which required that he should handle the money, and which duties were not such as the cestui que trust were alone interested in so as to waive them, in such case the trustee must receive and give receipts. For instance, if the trustee had to re-invest the money in land, or even in the funds, he must have the money to perform those trusts, and it would be simply absurd to require that a purchaser or person paying the money should see to such an application of it. The difficulty was in determining whether the duties of the trust implied a power to give receipts. Where there was an express power there was of course no question. A power to give receipts was implied in several instances:—

"1. Where debts and legacies were directed to be paid out of the money or debts only (and whether existing or imaginary), for to see money applied for these would be to administer a general and indefinite trust. Legacies alone, if to specified or ascertained individuals, would not be sufficient to imply a receipt power, for they might receive the fund themselves.

"2. If at the time of the death a sale were within the trust, and the recipients were at that time infants or incompetent to give receipts, here a power in the trustees was implied, as otherwise the sale would be nugatory. But if at the death the cestui que trust were not thus incompetent, the state of things at the time of sale would not help to imply a receipt power. If, for example, the funds had by transmission become vested in infants or other incompetent persons.

"3. If the duties of the trust were of an active nature, *ultra* the cestui que trust, and to perform which duties require either time or discretion, and also the possession of the money, then the trustee could give an effectual discharge.

"Under these circumstances we recur to the act, and are constrained to ask what is the effect of the section? Is it merely declaratory of the already existing law, or does it intend to free a purchaser from seeing to the application of his purchase money whenever there is a trustee of the fund? This can hardly be the construction, whatever may be the intentions of the section. It is restricted by the essential fact that the trustee shall be the person to whom the money is payable; and this we have seen he is not, unless he can bring his trust within such of the present rules of equity as enable him to handle the money. The section cannot apply where the *cestuis que trust* were at the date of the will ascertainable, or are now known and could be paid the entire fund.

"We can hardly bring ourselves to the conclusion that the section was intended simply to accomplish the excision from deeds and wills of the harmless declaratory verbiage that a person paying a trustee who was from the nature of the trust entitled to receive, and taking his receipt, should be effectually discharged from seeing to the application or being answerable for the misapplication thereof. Let us inquire for the antecedents of this section, and we think we discover them in that specimen of legislation which, after doing nine months of mischief, was quietly smothered—we mean the act for simplifying the transfer of property (7 & 8 V. c. 26), which was repealed by the 'Act to amend the Law of Real Property' (8 & 9 V. c. 106). We find that the tenth section of the above repealed act was extremely like the twenty-third section of our present act. We give such tenth section in its very words, indicating by brackets what is different from the corresponding section of the existing act.

"The *bona fide* payment to, and the receipt of any person to whom any [purchase or mortgage] money shall be payable upon any express or implied trust [or for any limited purpose, or of the survivors or survivor, of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns], shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security."

"Such being the section, and such its similarity to the present act—the difference being of little moment, and not affecting so much as is the very language of the now enactment—we are naturally led to inquire why, when the Legislature repealed the section by an act purporting to retain, though in more scientific language, all that was good in principle in the old act, this tenth section were not included if it were of utility or had any workable power? And why, if the negation of utility or power were the reasons for its exclusion, was it inserted fourteen years after in just so many words into the present act?

"We all know that the reasons for repealing the Transfer of Property Act were principally those given by Mr. H. Bellenden Ker, in his letter to the Lord Chancellor, 28th of April, 1845 (Browell's Real Property Statutes, p. 301).

"We give an extract from Mr. Ker's letter, relative to this unlucky tenth section:—

"As regards the tenth section, which enacts that the payment to, and the receipt of, any person to whom any money shall be payable on any express or implied trust shall be a discharge, it is conceived that it never could have been in the contemplation of the framers of the act to render in equity the receipt of the person entitled at law under every trust whatsoever (whether merely implied or otherwise), an effectual discharge to the party paying. The effect of this new rule, if carried to its fullest extent, would be to alter essentially one of the most important principles of a court of equity. It is conceived that the rule was intended to remedy an inconvenience of a much narrower extent. In equity, the person beneficially entitled is the person to concur in directing the payment to the trustee, except where the cestui que trust is unascertained or incompetent, or where there is some trust showing that the trustee was to have the money at his disposal for a particular purpose (as that of re-investment, &c.), or where there is an express declaration absolving the person paying from seeing to the disposition of the money. The rules, as to the liability of a party paying money to a trustee without the concurrence of the cestui que trust, to see the money duly applied, have varied, and are not yet precisely defined. To avoid any question, it has been usual to accompany a trust for sale, &c., with a declaration that the receipt of the trustee shall be a sufficient discharge. This occasionally is omitted, and thence a difficulty may arise either in ascertaining whether the party paying is or is not bound to see to the ultimate disposition of the money, or in procuring the concurrence of the party entitled, who may be abroad, &c. The evil goes to this extent only, but the remedy is far more extensive, and is one which a very slight consideration will show the danger of adopting. There can be no question but that it would be desirable to supply a fit remedy by carefully ascertaining the state of the law as regards any discrepancies or uncertainties and removing them, and so to extend the rule as to obviate all practical inconvenience."

"After the remarks of such a lawyer as Mr. Ker, we need not weary our readers by attempting to declare what is to be the construction of the present act in its twenty-third section. We must wait till the proper courts declare it, and in the interim we can only apply it to those cases which could in fact have stood without its aid."

On the whole, we feel little hesitation in saying that Mr. Horsey's work on Lord St. Leonards' Act is the best of those which we have seen, whilst it has another recommendation which in these days of small things is not to be overlooked—namely, its cheapness, which would, we should think, induce all our readers to become purchasers, and thus, whether their object be profitable practice or painful plodding for the examinations, furnish them with a safe guide to the understanding of a very important statute.

## FRANCILLON'S LECTURES ON ENGLISH LAW.

*Lectures, Elementary and Familiar, on English Law.* By JAMES FRANCILLON, Esq., County Court Judge. First Series, 8s. London: Butterworths.

Mr. Francillon's work is so different from an ordinary legal production, that we think it but justice to him, and we are certain it will be more satisfactory to our readers, to give an extract from his Introduction, where it is said:—"In the composition and publication of this work I make but slight pretensions to be the author of a law book. These lectures, written from materials compiled from various sources, for the use of two junior law students, to whom they are addressed, and in whose progress I take a deep interest, are now published in the hope that they may be useful to other young Englishmen, serving to make them familiar with the laws which the self-governing people of England have formed for themselves. In addition to my desire to render assistance to young professional students, my object is to initiate, in the study of law, others of our youth, destined, many of them as magistrates to administer, some of them as legislators to amend, and all as Englishmen to obey and defend, the laws of their country. With these views, far from attempting a regular treatise, I have selected and endeavoured to explain the more prominent parts of our law, and also those parts which appear to me the most likely to attract and interest young and well-trained minds. Hence it is that, of the many faults which will be perceived in this work, the most conspicuous, if not the most real, is the great fault of being too discursive, too full of digressions. If I can be said to have begun with a plan, I have found it impossible to adhere to it. The temptation has often been irresistible to offer what seemed useful information on interesting points, not within my original scheme. This has been especially the case when I have been treating of subjects with reference to which great changes have, in this age of legislation, been made by acts of Parliament. Changes of this sort have, since the year 1832, been so numerous, so important, so comprehensive in plan, so minute in detail, as of themselves to justify an attempt to write a new elementary work on English law. In my earlier lectures, however, I have thought it right to confine the attention of the student to some of the remains of the old common law of the land. In subsequent lectures will be found frequent explanations of the details of modern legislation." The present work is but a fragment, being, we presume, the whole of the first series, and comprises nearly 200 pages. It treats of a variety of topics—such as common law, statute law, inheritances, crown descents, peerages, local customs, borough-English and gavelkind, copyholds, modes of trial, law merchant, trade usages, agriculture, husbandry customs, inclosures, custom and prescription, water rights, nuisances, servants, presumptions, rule of the road, negligence, gleaning, markets, fairs, &c., ferries, highways, &c., innkeepers, carriers, &c., and a great variety of other topics. We confess we do not understand the prin-

ciple upon which the various divisions are made, and which would appear to be very unsystematic if we may judge from the fact that many of the topics appear several times in different portions of the volume, though we presume this arises from the well-known fact that various general titles of the law have application to many very different topics, and if not therefore critically arranged, may crop up on different occasions. Mr. Francillon does not follow the practice of most law writers of quoting authorities for his propositions; indeed, he rarely quotes any, though now and then he gives an extract from a judgment which appears to throw light on his subject. The volume comprises about forty lectures or chapters, which are, however, very short, and are written less in a technical than in a quasi-popular style. We think that many students will be attracted to the work by the mode in which it is written, which is evidently such as a mere lawyer would not have adopted. The following is Lecture XXVIII., on 1, servants; 2, husbandry servants; 3, hiring for a year; 4, mops, hiring fairs; 5, husbandry servants, summary jurisdiction of magistrates; 6, general hiring; 7, yearly service; 8, domestic or menial servants; 9, warning; 10, clerks, &c.; 11, trade usages. "In my last lecture, speaking of the law deriving, from a general letting, a yearly tenancy, I suggested as the origin of the rule, the necessity that a farmer should always have a certain interest in his farm for at least the current year. Now it happens that the work on a farm, varying greatly in the course of a year, is, taking the whole year together, nearly the same in every successive year; and in former times it was found convenient to both farmers and labourers, that labourers should be hired for a year, during which they should be maintained by their employers, and that they should receive a stipulated sum as wages for the whole year. Thus the farmer secured the services of the labourer in the harvest and at other busy times, and the labourer secured a home and maintenance in winter and at other times when there would be but little for him to do. At all times, men having wives and families were less often thus hired by the year, than were unmarried men. The married could not be inmates of the farm-houses, and they needed weekly wages to support their families. Single men are still often hired by the year; but this is becoming less frequent, since it has been found beneficial for much agricultural work to be paid for as piece-work, and not by wages either weekly or yearly. The women servants in farm-houses are still in many parts of the country usually hired for a year certain.

"Those only who live in some parts of England know to what extent the system of yearly service has influenced the habits of the peasantry. I will mention but one example of this. Strangers who happen to visit the districts to which I allude about Michaelmas are surprised at the scenes they witness in market towns, where the mops, as they are called, take place, fairs at which the farmers of the neighbourhood hire servants, men and women, for the year usually beginning on Old Michaelmas-day, the 11th of October. The streets, crowded with farm labourers and servant girls waiting to be hired, have a singular aspect, and there are amusing groups of



farmers and their wives and country boys and girls and their parents engaged in earnest conversation.

"A mop is the great holiday for the country people, and bringing together, in a large town, great crowds of young persons, and on the vagabonds by whom fairs are frequented, is regarded as a great evil. All the usual amusements of a fair, some of them of a demoralising tendency, are the characteristics of a mop, a holiday to which the peasantry are greatly attached, and which the clergy and country gentlemen cannot induce them to forego by hiring themselves to the farmers at home. It is considered a great advantage to a town to have a mop, by reason of the profit which it brings to the innkeepers and tradesmen.

"As you may readily suppose, disputes frequently arise between persons of various tempers tied to each other for a year; and the Legislature has intrusted the justices of the peace with a summary jurisdiction over husbandry labourers and their employers. In the exercise of this jurisdiction magistrates have powers to enforce payment of wages and protect the servants from ill-treatment, and to punish those of them who are guilty of desertion, disobedience, or other misconduct. Desertion is the offence in respect of which these powers are frequently exercised. This jurisdiction confined to husbandry servants, and not applying to domestic servants, will be treated of in some future lecture as one of the many summary jurisdictions with which justices of the peace are invested.

"In the practice of engaging labourers for a year, probably originated a rule of law, that a general hiring, that is, a hiring without any period of service being stipulated, is a hiring for a year. No time being named, the parties are supposed to be acting in conformity with the usual practice. I have before mentioned the tendency to uniformity of laws originating in usage. This is an instance; for the rule making a general hiring a hiring for a year has extended itself to all classes of servants.

"Except in farm-houses, domestic servants are not often hired for a year certain, or for any stipulated period. In their case the rule that a general hiring is a hiring for a year has been greatly modified by usage, as I will now proceed to explain.

"It often happened that, at the end of a year of service, under a general hiring, a servant continued in the place without any renewed hiring, except that implied in the continuance of the service. Thus originated what was called a yearly hiring, or a hiring by the year; the service lasting for as many successive years as the two parties, master and servant, thought proper. After some time, usage, in the case of domestic servants, engrafted upon this mode of service a right upon the part of either party to put an end to the service at any time by a month's notice, or, as it is usually termed, a month's warning.

"It so happens that the idea of hiring for a year, or a yearly hiring, is, in our times, as respects domestic servants, quite lost sight of; and the law has come to this, that a general hiring of a domestic servant is a hiring for a time indefinite, each party having a right to put an end to the service at

any time by a month's warning, and the master having also the power to dismiss the servant at any time, giving a month's wages instead of warning.

"That of domestic servants hired generally is the only case in which the common law gives effect to a warning. Thus it has been decided (*Beeston v. Collyer*, 5 L. J. C. P. 180), that a clerk to an army agent hired generally, and whose service is therefore a yearly service, cannot be dismissed by means of a month's warning, and his service can be determined only at the end of a year.

"There are, however, some instances of the usages of particular trades giving validity to notices of this sort. You will find one instance in my fifteenth lecture, in which you will also find this passage, which I repeat as most appropriate to the subject of this lecture:—

"The difference between the case of a domestic servant and that of any other servant is this: it is a part of the general law that either party may, by notice, determine the service of a domestic servant; it requires, in any trade, a special usage to give effect to such a notice. Of the general custom in respect of domestic servants, a court takes notice as of a part of the common law; the usage of a particular trade giving effect to a notice must, if disputed, be proved as a matter of fact.

"In the expression of law on the subject of warning, putting an end to a service, the word *menial* is sometimes used as equivalent for the word *domestic*, and the question sometimes arises, what is a *menial* or *domestic* servant? A head gardener at yearly wages, with a house to live in, rent free, not part of his master's house, has been decided (*Gowlan v. Ablett*, 4 L. J. Ex. 155) to be a *menial* servant, who could be dismissed by a month's notice.

"Delivering a judgment of the Court of Exchequer, that a governess cannot be dismissed by means of a month's warning, Chief Baron Pollock said, 'We are of opinion, that a governess is not within the rule or custom as to *menial* or *domestic* servants. The position in which a governess is placed, the station which she occupies in a family, the manner in which such a person is usually treated in society, certainly place her in a very different situation from that of *domestic* or *menial* servants.'

"At first sight you may think that in both these two judgments, that of the gardener and that of the governess, the etymology of the words *menial*, *domestic*, is disregarded. On reflection you will perceive this is not so. Though a gardener may not live within the walls (*intra mœnia*) of his master's dwelling, his duties have reference to his master's household. Though a governess may live in the house of the parents of her pupils, her duties have no reference to the household. Quite agreeing with the Barons of the Exchequer in the principles they express, as far as those principles go, I think I have suggested a yet more satisfactory reason for their decision.

"Whether a servant is engaged for a definite time, or hired generally, and whether he might or might not be dismissed by means of a month's warning, he may be at any time dismissed without warning for gross misconduct in point of morals, wilful disobedience, or habitual negligence;

and, if so dismissed, he forfeits his right to wages for the time he has served, since the last period for payment of his wages. Whether alleged misconduct is such as to justify instant dismissal, with loss of wages, is sometimes a difficult question of fact, or of law, or of both in relation to each other."

Our readers will have been able to form some notion of the mode in which Mr. Francillon has performed his self-imposed task, and we think the extract we have above given will induce them to make a further acquaintance with the work, in which case we have little doubt they will receive much instruction, conveyed in an agreeable manner; for Mr. Francillon has produced a very readable volume, which, in this respect, forms a striking contrast with ordinary law books. If the other portions are as ably done, Mr. Francillon will confer a benefit on the rising generation of lawyers, and of those "lay gents" who may desire to acquire some knowledge of the principles of the law.

#### HUNTER ON LAW REFORM.

*Observations on Real Property Law Reform.* By SYLVESTER JOSEPH HUNTER, Esq., Barrister-at-Law, Editor of the "Law of Real Property Amendment Act." London: Butterworths.

The object of this pamphlet is to advocate a moderate course of real property law reform, and especially to oppose the scheme for a registration of titles. The learned writer winds up by asserting, "that no scheme of wholesale legislation yet proposed would be effectual to diminish the expense of sales, or to increase the security of titles. To attain this object the attention of our law makers should be directed to gradual reform; to abolishing any particular rule of law which on careful consideration is found to work more harm than good; and to conferring such rights and powers as, on a like consideration, are certain to produce considerably more good than harm.

"The course of law reform here sketched is that which has been consistently pursued by the Legislature for the last thirty years. Little is known upon the subject beyond the limits of the profession; but it is scarcely possible for the present generation of lawyers to realise the state of things which existed before the year 1830, and of which they know nothing except by tradition. That year witnessed the passing into law of the statute, which was repealed and re-enacted with considerable extensions by the Trustee Act, 1850. In a great variety of cases, where an application to the Court of Chancery is necessary, the expense has been reduced to perhaps one-fifth of what it was, and the time employed has decreased in a still greater proportion. The same may be said of the Trustee Relief Act, by which trustees are enabled, in many cases, to relieve themselves of their duties by simply paying the money into the Court of Chancery, under circumstances where it would formerly have been necessary to institute a formal suit to have the trusts declared, the expense of which would fall, in the first instance, on the trustees, and ultimately on the fund. These acts,

joined with those of 1852 and subsequent years, simplifying the practice of the once-dreaded Court of Chancery, have made that tribunal practically accessible in the smallest cases, and thus prevented an incalculable amount of expense, delay, and injustice. The effect is similar to that of the County Court Acts, through which innumerable debts have been recovered which must otherwise have been lost.

"These statutes do not bear immediately on conveyancing: it is difficult to explain to the non-professional reader the way in which the expense of the transfer of land has been diminished by recent legislation; but every lawyer is familiar with the provisions of the statutes comprised in Mr. Shelford's collection, and the effect they have had may be judged of from the fact that an eminent conveyancer told the writer that through the operation of a single statute (8 & 9 V. c. 112, the Satisfied Terms Act), his fees were reduced nearly one-half. This fact is most eloquent.

"The course of legislation thus begun has by no means ceased. In the course of the last session, Lord St. Leonards carried through Parliament an act which, in spite of some blemishes introduced in the House of Commons, and for which his lordship is not responsible, is an excellent specimen of the kind of law reform here advocated. A bill which has already passed the House of Lords in the present session, under his lordship's auspices, is a further step in the right direction, and, as we may especially mention, deals with that doctrine of constructive notice which has been before alluded to as a frequent source of hardship to purchasers."

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## ARTICLED CLERKS.

### *The New Act affecting Articled Clerks.*

The bill respecting attorneys, solicitors, proctors, and certificated conveyancers, containing important provisions respecting articled clerks, has undergone many alterations; and as it is yet uncertain what shape it will finally assume, we do not propose to give the bill in full, but only those clauses which particularly affect articled clerks, and of those only such as are new and of an important character. These clauses relate to graduates, ordinary clerks, university examiners, registration, examinations on general knowledge and during articles, as to employments during articles, examination before admission, and the palatine courts.

*Graduates.*—Sec. 7 of 6 & 7 V. c. 78, is repealed, and a B.A. or LL.B. of Oxford, Cambridge, Dublin, Durham, or London, or the Queen's University in Ireland, who after taking such degree, and either before or after this act has served under articles three years, and been examined and sworn after that term, may be admitted and enrolled, and service of a year of the term with the London agent, either under a stipulation in the articles, or with the solicitor's permission, shall be good; and where any person has before this act, and after having taken such degree, been bound for five years, he

may, after serving three in like manner as if he had been bound for three only, and been examined and sworn, and with the consent in writing (indorsed on the articles) of the solicitor to the determination of the articles, be admitted and enrolled; and when the consent has been given and acted upon, the articles shall be deemed to have determined as by effluxion of time (s. 2).

*Ordinary clerks.*—A *bonâ fide* clerk to a solicitor for ten years, engaged during that time in solicitors' business, and who, before examination, shall produce satisfactory evidence of fidelity, honesty, and diligence, as such clerk, and who either before or after this act has been bound and served for three years, and been examined and sworn after that term, may be admitted and enrolled, service with the London agent, by stipulation or the solicitor's permission, being deemed good; and where any person has, before the passing of this act, and at any time after, been a *bonâ fide* clerk for ten years, and been bound before this act for five years, he may, after having served three years, and been examined and sworn, and with the consent in writing (indorsed on the articles) of the solicitor to the determination of the articles, be admitted and enrolled; and upon such consent given and acted upon the articles shall be deemed to have determined as by effluxion (s. 4).

*University examiners.*—The Chief Justices and Chief Baron, with the Master of the Rolls, may by regulations direct that any persons having successfully passed any Oxford or Cambridge examination already established for non-students, or any other similar examination (to be specified in the regulations) hereafter established in any of the before-mentioned universities, or the matriculation examination there, or other similar examination, may be admitted and enrolled, after having been subsequently bound, and having served four years, and being examined and sworn after that term; and the said judges may revoke or alter the regulations, but not so as to allow less than four years (s. 5).

*Registration.*—The articles, and also any assignment, within three months after enrolment and registration, under the 6 & 7 V., shall be produced to the registrar, who shall enter the names of the parties to and date of the contract and of assignment (if any), and the term of service, in a book, and shall mark the contract and assignment as entered, at fees of 5s.; the book to be open to public inspection; and in case the articles and assignment be not so produced and entered within the three months, the clerk's service shall be reckoned from the production and entry, unless, upon application, one of the superior courts, or a judge, or a judge in Chancery, shall otherwise order (s. 7).

*General knowledge.*—The Chief Justices and Chief Baron, with the Master of the Rolls, may make regulations for the examination in such branches of general knowledge as they think proper of all persons (not graduates or having successfully passed an university examination) hereafter becoming bound, and the regulations may require such examination to be passed either before becoming bound or before admission; and the judges

may revoke or alter the rules, and may appoint the examiners; and no person required to pass such examination can be bound where the examination is required to be passed before being bound, or be admitted where it is required before admission, unless he previously obtain from the examiners a certificate of having satisfactorily passed: provided that the said judges, or any of them, may, under special circumstances, dispense with compliance, entirely or partially, or under conditions (s. 8).

*Examination during articles.*—The same judges may make regulations for the examination of persons hereafter becoming bound at any periods of their service, to ascertain their progress in knowledge necessary for rendering them fit and capable to act as solicitors, and such examination shall be conducted by the examiners appointed under the first-mentioned act, or such other examiners as the said judges may appoint; and in the case of persons not passing such examination to the examiners' satisfaction, the regulations may postpone either conditionally or otherwise, the examination required to be passed at the expiration of the term of service under articles and before admission (s. 9).

*Other employment.*—No articulated clerk shall, during the term of service, hold any office or engage in any employment other than the employment of clerk in the solicitor's business, save as hereinbefore and in the first-mentioned act provided; and every person, before being admitted, shall prove by the affidavit required under sect. 14 of the first-mentioned act, that he has not held any office or engaged in any employment contrary to this enactment (s. 10).

*Examination before admission.*—This examination, under the first-mentioned and this act shall be deemed to include such examination touching fitness and capacity to act in matters of business usually transacted and performed by solicitors, as the examiners deem proper, subject nevertheless to any rules to be made under the first-mentioned act (s. 11).

*Palatine courts.*—No person hereafter bound to any attorney in either of the palatine courts can be admitted and enrolled in such court, unless, after the expiration of his term, he have been examined in like manner as required before admission in the superior courts or in the Court of Chancery, and the palatine judges be satisfied by such examination or the examiners' certificates of his being qualified (s. 12).

*Articles expiring in vacation.*—On the bill going into committee, Lord Cranworth carried a clause (s. 12) to the effect that, where any of the periods for three, four, or five years, mentioned either in this act or in the 6 & 7 V., shall expire in any vacation, the examination may be passed in the preceding term; and in or after the vacation, the Master of the Rolls, as to the Court of Chancery, and any one of the judges as to the common law courts, may do all acts necessary for or towards the admission and enrolment of the person as provided in the last-mentioned act.

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GRADUATES.—*Articled clerk*—*Degree of M.A. in 1849*—*Articles dated January, 1859*—*Filing nunc pro tunc*—6 & 7 V. c. 73, s. 7—*Expected legisla-*

tion to relieve similar cases.—We may, in connection with the above, refer to the following decision relative to articted clerks being graduates:—An articted clerk, whose articles were dated January, 1869, had taken his degree of M.A. in 1849. The affidavit stated that, expecting that a bill would be introduced which would be applicable to such cases as his, the affidavit of the due execution of his articles had not been made within the six months of their date, as required by 6 & 7 V. c. 73, and they had not been enrolled. The court allowed them to be filed *nunc pro tunc*. *Re McDonald*, 1 Law Tim. Rep. N. S. 826.

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## RESULT OF EXAMINATIONS.

(Hilary Term, 1860.)

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The examiners are becoming severe enough to suit those persons who are so anxious, now the profession is becoming profitless, in a pecuniary point of view, that every solicitor should be a perfect lawyer. At the last examination, Hilary Term, out of eighty-two candidates no less than thirteen were sent back to their studies and their crammers. As might easily have been foreseen, as the candidates have now two days for answering the questions they are required to give much better answers than before, so that what bears the aspect of a boon is, in truth, anything but a kindness. We understand that the reason of the failure of so many is, that they are foolish enough (misled by some interested persons) to confine themselves to the three indispensable branches, altogether ignoring criminal law and bankruptcy. The consequence is, that a *prima facie* case of insufficiency is presented to the examiners, and if the three indispensable branches be not very well answered (a very unlikely thing) the candidates are sure to be rejected. We hope our readers will take a hint from this, and do their best to answer the questions in all the branches. The examiners have decided upon giving out on the first day the common law and conveyancing questions, the former to be answered before one o'clock, the latter (after the former are disposed of) to be answered before four o'clock. On the second day, the candidates have equity, bankruptcy, and criminal law, each to be disposed of within a limited time, and only one branch at a time being placed before the candidates. This is, no doubt, an improvement, but it has not a very encouraging aspect for those who have not been diligent students, having very much the appearance of a methodically devised system for actually testing the real merits of the candidates.

The examiners recommended:—

TAYLOR, JOHN ODDIN HOWARD, aged 22, who served his clerkship to Messrs. Taylor and Ling, of Norwich.

LITTLEWOOD, RICHARD JOHN, aged 22, who served his clerkship to Messrs. Collinson, of Doncaster.

SHOARD, JOHN, J.L.B., aged 22, who served his clerkship to Mr.

Arundel Rogers, of King's Bench-walk, Temple; and Messrs. Becke and Metcalfe, of Bedford-row, London.

BACHELOR, JOHN, aged 21, who served his clerkship to Messrs. Kingsford and Dorman, of Essex-street, London.

DUNCAN, CHARLES WILLIAM, aged 24, who served his clerkship to Mr. Wm. Gray, of York.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—

To Mr. TAYLOR, the prize of the Honourable Society of Clifford's-inn.

To Mr. LITTLEWOOD, the prize of the Honourable Society of Clement's-inn.

To Mr. SHOARD, one of the prizes of the Incorporated Law Society.

To Mr. BACHELOR, one of the prizes of the Incorporated Law Society.

To Mr. DUNCAN, one of the prizes of the Incorporated Law Society.

The examiners have also certified that the following candidates, whose names are placed in alphabetical order, passed examinations which entitle them to commendation:—

CHAMBLEY, GEORGE HENRY, aged 21, who served his clerkship to Mr. John Simpson Rutter, of Wolverhampton; and Messrs. Loftus and Young, of New-inn, London.

MATTHEWS, MARMADUKE, the younger, aged 22, who served his clerkship to Messrs. G. F. Hudson and Co., of Bucklersbury, London.

SIKES, JOHN CHURCHILL, aged 22, who served his clerkship to Mr. Wm. Francis Holcroft, of Sevenoaks; and Messrs. Loftus and Young, of New-inn, London.

WOLLEN, JAMES WILLIAM GRANT, aged 22, who served his clerkship to Messrs. Kitson, of Torquay; and Messrs. Gregory, Son, and Clark, of Clement's inn, London.

The council have accordingly awarded them certificates of merit.

The examiners have further announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them either to a prize or a certificate of merit if they had been under the age of 26:—

FOSTER, CHARLES THOMAS, aged 31, who served his clerkship to Mr. Wm. Hunt, of Field-court, Gray's-inn.

MURRAY, HENRY, aged 35, who served his clerkship to Messrs. Miller and Horn, of George-yard, Lombard-street; and St. Martin's-place, Trafalgar-square.

PARKER, HENRY WILLIAM, aged 27, who served his clerkship to Messrs. Marshall and Sanderson, of Berwick-upon-Tweed; and Messrs. Woods and Jackson, of Rochdale.

PONSFORD, THOMAS, aged 48, who served his clerkship to Mr. Copleston Lopes Radcliffe, of Plymouth.



## Summary of Decisions.

### EQUITY AND CONVEYANCING.

**LEASE.**—*Free of all outgoings—Land-tax.*—In an agreement for a farming lease, the tenant agreed to pay a rent of £40 per annum "free from all outgoings." He afterwards claimed to be allowed to deduct from his rent the land-tax and commutation rent-charge: Held (overruling the decision of *Stuart, V. C.*), that the tenant was not entitled to make these deductions. *Parish v. Sleeman*, 1 Law Tim. Rep. N. S. 507.

**TENANT FOR LIFE.**—*Timber, cutting—Income of fund produced thereby—Tort, remedied at law and not in equity.*—Where timber, ripe for cutting, is cut by a tenant for life impeachable for waste, he is entitled to the income of the fund produced by the sale thereof; and the first person taking an estate unimpeachable for waste will, on coming into possession, be entitled to the capital. Where the timber so cut is not ripe for cutting—semble, the produce belongs immediately to the first person having an estate of inheritance passing over all the intermediate life estates whether impeachable for waste or not. But whether it belongs to him or to the first tenant for life unimpeachable for waste, the cutting being a tort, the remedy is by action at law, and not in the Court of Chancery. Therefore, under no circumstances can a tenant for life unimpeachable for waste be entitled, on coming into possession, to back interest on the produce of timber, whether properly or improperly cut by a previous tenant for life impeachable for waste. *Gent v. Harrison*, 29 Law Journ. Ch. 68.

### EQUITY PRACTICE.

**ABATEMENT.**—*Marriage of a female plaintiff—Proceedings notwithstanding abatement—Revivor.*—The marriage of a female plaintiff abates the suit (1 Eq. Cas. Abr. 1; Ayckb. Pract. 348). In the following case it appeared that, notwithstanding the marriage of a female plaintiff, proceedings were continued as if the suit had not abated. Upon motion, made by consent of all parties, V. C. Wood ordered the suit to be revived as against her and her husband, and to be in the same condition as it would have been had an order for revivor been made immediately upon the marriage. *Powell v. Heather*, 1 Law Tim. Rep. N. S. 479.

**PRO-CONFESSO.**—*Decree—Summons—Proceedings before chief clerk.*—Where an order is made to take a bill pro-confesso, a time must be named in the order for service of such decree, within which the defendant, being out of the jurisdiction, is to be at liberty to set aside or vary the decree (86th and 87th Ord. of 1845). V. C. Wood has decided that a defendant against whom a decree to take the bill pro-confesso has been obtained must be served not only with the copy of such decree, but of summonses before the chief clerk, to carry out the objects of such decree. The time limited by the 86th and 87th Orders of 1845, within which a defendant out of the jurisdiction may apply to vary or set aside the decree, applies equally to a summons taken out under such a decree. *Golden v. Newton*, 1 Law Tim. Rep. N. S. 541.

## CORRESPONDENCE ON MOOT POINTS.

Gentlemen,—Allow me to call the attention of correspondents on moot points to the following, unanswered, in vol. 1, N. S.; and as the majority of correspondents are moot point answerers rather than mooters, I would call their attention to the following, which have not, perhaps, had their share of attention; and I would suggest that the above gentlemen confine themselves to them before “attacking” the more recent ones:—

Pages.	Moot Points.	Pages.	Moot Points.
28 .....	8	236 .....	105
101 .....	81	236 .....	106
102 .....	89	237 .....	110
108 .....	40	284 .....	112
180 .....	55	287 .....	128
162 .....	58	882 .....	141
163 .....	64	888 .....	147
166 .....	74	888 .....	148
166 .....	75	884 .....	154
197 .....	82	898 .....	164
199 .....	91	899 .....	167

These are all in vol. 1, N. S., but there are several in vol. 2, N. S., which also remain unanswered, and as most of them are important ones both to solicitors and articulated clerks, I should be glad if you would call attention to them.

## A LOOKER-ON.

The following are the only additions to the lists at pp. 55, 56, and on cover of No. 70, namely, Mr. T. G. Sandy, of Wolverhampton; Mr. M. A. Troughton, Milton House, Milton-on-Thames; Mr. C. F. Wilson, Keswick.

Mr. Lavender's address at p. 55 should be Bury Hall, Wolverley, near Kidderminster.

There are several moot points in this Number which arrived too late to be sent round to correspondents, but that ought not to be an impediment to correspondence. We have complaints from gentlemen on the new and old lists that they do not receive any communications; cannot this be obviated? The remedy lies with our subscribers; and we may say it is quite incredible to us that articulated clerks should neglect the opportunities given them by the correspondence system: we are sure if it had been in existence in our student days we should have been glad to have availed ourselves of its evident advantages.

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Moot Points.

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No. 19.—*Settlement—Disclaimer of Trustee.*

By a post-nuptial settlement lands were conveyed to A. B., upon certain trusts for the benefit of the settlor's wife and children. A. B. has never executed the deed, or otherwise accepted the office, or acted in the trusts, but has executed a deed of disclaimer. The settlor has since contracted to sell the lands included in the settlement, and has offered to execute the

purchase deed, but the purchaser requires that a new trustee should be appointed or a vesting order obtained, which, however, the settlor refuses to do, alleging that he can give the legal estate and a good title without the appointment of a new trustee or obtaining a vesting order. Is this correct; and, if correct, could the vendor sustain a bill for specific performance?

T.

*No. 20.—Satisfied Terms—Assigning.*

Many years ago, a satisfied term for 1,000 years had been assigned to a trustee of a purchaser in fee, in trust to attend the inheritance. In the year 1830, a mortgage was executed by such purchaser for a term of 1,500 years, but no assignment was made of the satisfied term, nor did the trustee execute any declaration of trust of the term. In 1840 a second mortgage was made of the fee simple, but expressly subject to the prior mortgage; and the trustee of the term joined in the deed, and declared that, subject to the first mortgage and the raising of the amount thereby secured, he held the term for the purpose of better securing the second mortgage. The term has never been subsequently dealt with, and the first mortgagee (having foreclosed the second mortgagee and the mortgagor) is now selling the 1,500 years' term. Should the purchaser require the old term to be assigned? Is the 1,000 years term a satisfied one within the meaning of the Outstanding Terms' Act, and, if so, is it otherwise within sec. 1 of that act?

M. J. N.

*No. 21.—Vendors and Purchasers—Sale of Shares of an Estate.*

A vendor offers for sale three-tenths of an estate consisting of several acres of land, and stipulates that he shall not be required to show any title prior to a deed executed in 1820, whereby the three-tenths were conveyed to A. B. in fee, and that no earlier title shall be required or investigated, and that all recitals shall be accepted as true. The deed of 1820 recited a seisin in fee by the then vendor of such three-tenths, and an agreement by the then purchaser to purchase the same. A third person is the owner of the other seven-tenths, and he refuses to allow his title deeds to be inspected; but it is known that his title commenced in 1788, and with a will devising the property in question to ten different persons in ten equal portions as tenants in common in fee, and that the vendor in 1820 was not one of these devisees. Could the purchaser, notwithstanding such stipulations as above, refuse to complete unless it were shown that the three-tenths were different from those conveyed to the third party, or must he not complete without any requisition on or investigation of the earlier title to his three-tenths?

H. E. S.

*No. 22.—Lessee for Lives.*

A. is lessee of a mill for the lives of B. and C., and the life of the survivor of them. He is also occupier of the mill. On the death of the cestui que vie surviving, can the lessee claim the occupation of the premises for any and what period, at a fair rent, so as to enable him to fulfil his contracts to

supply articles to be produced from the mill, or must he quit, after the expiration of a reasonable time allowed him for the removal of his effects?

W. M. SHERRING.

No. 23.—*Wills Act—Devise to Attesting Witness, &c.*

W. H., by will, dated 1859, devised certain property to B., a spinster. To this will A. was an attesting witness. A few months after the execution of the will, but during the lifetime of testatrix, A. married B. Is the matter affected, and how, by s. 15 of the Wills Act, 1 V. c. 26?

My own impression is, that the validity of the devise is not thereby affected, for the reason that A. and B. were not married till after the attestation of the will; and I cannot see that their subsequent marriage can have any effect upon the devise. The words "to whom, or to whose wife or husband," used in that section, refer, I take it, to parties filling that capacity at the time of the attestation, and is not affected by subsequent events.

Perhaps "Causidicus," "A. K. R." "F. A. C.," or other conveyancing correspondent will give me the benefit of their opinions upon the point.

JOHN W. S. LAVENDER.

No. 24.—*Going Armed—Penalty.*

What is the penalty imposed by the 2 Edw. 3, c. 3, for going or riding armed? and would a sword-stick come under the denomination of a "dangerous or unusual weapon?" Also, supposing it to be not unlawful to carry a sword-stick, under what circumstances would it be lawful to use it?

M. G. B.

No. 25.—*Tenant for Life.*

An estate is devised to A. for life, and on his death to his son B., an infant, for an estate tail. A. is desirous of obtaining a loan upon the property. Can A., by virtue of the 3 & 4 W. 4, c. 74, charge the property with a mortgage debt without the concurrence of B., the tenant in tail in remainder?

M. G. BOOTY.

No. 26.—*Bankruptcy.*

A., a trader, before he commits any act of bankruptcy, draws a promissory note for £50, payable to B. or order, then A. commits an act of bankruptcy, and afterwards B. indorses the note over to C. Who is the petitioning creditor?

M. G. BOOTY.

No. 27.—*Married Woman's Reversionary Interest in Personal Estate.*

By 20 & 21 V. c. 57, married women are enabled to dispose of every reversionary interest in any personal estate to which they may become entitled under any instrument (except a marriage settlement) made after the 31st of December, 1857.

Does this act apply where the reversionary interest is under a will dated before 31st December, 1857, the testator having died after that date?

I am of opinion that it does, the act of 7 W. 4 and 1 V. c. 26, s. 24, having enacted "that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it

had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." N. R.

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## Answers to Moot Points.

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### No. 19.—*Settlement—Disclaimer of Trustee* (ante, p. 93).

This case is not very clearly stated; the mooter does not say whether the settlement was made in consequence of an agreement entered into before the marriage or not—for upon this must the answer depend. If there was no agreement made, the settlement would then be voluntary, and void as against a subsequent bona fide purchaser; the husband is possessed of the legal estate, can make a good title, and enforce specific performance; but if, on the other hand, the settlement was made in consequence of an agreement entered into before the marriage, the consideration being marriage, and therefore a valuable one, the purchaser's objection to the title is perfectly right, and a court of equity would not enforce specific performance of the contract (Cruise's Dig. vol. 4, Title 32, Deed, c. 28, ss. 23—74).

J. H.

NOTE.—Our correspondent seems to have overlooked the doctrine that a sale to override a voluntary settlement cannot be enforced by the settlor (Johnson v. Le., T. & R. 281; Smith v. Ga., 2 Mer. 123; Fry on Spec. Perf. 113, 258).—EDS.

### No. 22.—*Lessee for Lives* (ante, p. 94)

It was settled in Leedford v. Barber (1 T. R. 95), that where a lease is granted for the life of the tenant, or of any other person, it was determined by their respective deaths, on the happening of which event it will immediately cease. Therefore, on the ruling of this case we have no hesitation in saying that A. would be obliged to quit on the death of the cestui que vie.

J. H. (Equitas.)

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## Debating Societies.

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Gentlemen,—We have formed a society in Halifax for the discussion of moot points, &c. There are only five articulated clerks in Halifax, and the plan we have adopted is this. The person proposing the question acts as chairman for the evening, and two take the affirmative, and two the negative. The reason why I mention this is, that if any of your correspondents are desirous of establishing a debating class, they may do so upon the above principle. During our debate on Monday, the 5th inst., the following question arose:—"A., the owner of certain enclosed lands, grants an authority according to the stat. 11 & 12 V. c. 29, to shoot hares. B. is the occupier of the land." Can the owner, occupier, and authorised person shoot hares at one and the same time without a game certificate?

I should feel obliged if you would kindly insert the above in your next CHRONICLE.

Yours, &c., WALTER STOREY.

## Notices of New Books.

### BIGG'S COMPLETE EDITION OF EXISTING STATUTES.

*Specimen Volume of Proposed Complete Edition of Existing Public Statutes: being a Collection of Public Statutes relating to the General Law of England, passed by the Seventeenth Parliament of the United Kingdom, 20 & 21 V. 1857, to 22 V., sess. 1, 1859 (as amended to close of sess. 2, 1859), with Explanatory Preface, Tables of all the Public Statutes passed during each Session, Register of Public Statutes amended, &c., and Indexes to English Statutes.* Edited by JAMES BIGG. London: Simpkin and Co.

We have before had occasion to call attention to the strictures of Mr. Bigg on the defects of the Statute Book, and his proposals for a reform. There can be no doubt that Mr. Bigg's experience entitles him to give an opinion on these matters, and we have no doubt that the profession will be willing to consider his views. Respecting the defects of the statute book there can hardly be two opinions: the only question is as to the effectual mode of getting rid of the existing objectionable state of things without risk of bringing into operation a still worse system. Mr. Bigg refers to the various discussions in Parliament respecting the defects of the statute book, and as to the risks incident to consolidation, and observes—"One result of these discussions appears to be that there are difficulties in the way of effecting any extensive system of consolidation which cannot be overcome, unless Parliament in this matter were virtually to delegate their powers of legislation to a public board." Mr. Bigg then refers to the recommendations of the Statute Law Commission in favour of an edition of Existing Statutes, and observes that they recommend a new edition of the statutes passed since the Union, the advantage of which to the public would be considerable, even if no consolidation were effected; this edition to be confined to the statutes and parts of statutes now remaining in force; those statutes only to be omitted which are without reasonable doubt inoperative; and to be accompanied by notes (where necessary) explanatory of the reasons for inserting or omitting any enactment, and also respecting the connection of each act with other statutes, but not (as a general rule) by notes of any other character. They state that the new edition should be arranged so as to enable all persons to obtain what they want at a moderate price, without being compelled to buy at the same time a large quantity of what they do not want; and that the utility of the suggested edition would be much diminished, unless the acts which have ceased to be in force, from any reason whatever, were omitted from it. They also state that they have entered into particulars as to the possibility of publishing a useful new edition of the statutes, because they believe there are persons who consider that any satisfactory consolidation of them is impossible; and in reference to the common 4to edition of the statutes in 41½ volumes, they draw attention to the fact that the first nine volumes, containing the acts down to 4 Geo. 3,

were published simultaneously, or nearly so, under the care of an editor, Mr. Owen Ruffhead, and contain only the acts which remained in force at the time of publication, and that the remaining volumes are merely a series of periodical publications. This report also contained a paragraph recommending that the new edition should be arranged in parts or fasciculi, each containing one of the classes; and a statement that her Majesty's printers will be willing to print such an edition without expense to the public, beyond stipulating for the purchase by the Government of the same number of copies as are now taken of the acts of every session for the use of magistrates, and for other public purposes; but it was afterwards ascertained that the classification upon which the last recommendation was based was imperfect and unsatisfactory; and that the proposal of her Majesty's printers, although prefaced with the attractive words "*without expense to the public*," was accompanied by a stipulation which would have bound the Government to purchase about 4,135 copies, and the public to pay, by way of purchase-money, a sum very considerably exceeding any amount of charge that could be made if the same number of copies were printed by her Majesty's printers under the direction of Government, at the expense of the public. This report was agreed upon on the 12th February, but was not presented to Parliament until the 10th June; and the editor of this volume has reason to believe that this delay was, in some measure, occasioned by the consideration of his plan, and that if the change of Government had not taken place, and the commission had continued, such plan would have met with the approval of the majority of the commissioners. Mr. Bigg then states his own proposals to Government for the publication of an edition of existing statutes, from which we take the following particulars:—

"First. Statutes relating to the General Law of England.—'To edit and publish (without any aid from the public revenue, or any stipulation for the purchase of copies by Government) a complete edition of the "Existing Statutes relating to the General Law of England," uniform with the "Statute Book for England," provided that the text of the statutes printed therein receive, previous to the publication of the work, the sanction of some authorised officer.'

"Second. Statutes relating to Great Britain and Ireland.—1. 'To edit and publish a complete edition of all the existing public statutes, passed by the Parliaments of the United Kingdom, relating to Great Britain and Ireland, at the rate of 2,400 pages annually; provided that her Majesty's Government will subscribe for 1,250 copies, for the use of the legislature and public offices, at a reduction of forty per cent. from the publication price.'

"2. 'At the close of each session, the sheets containing statutes in which amendments have been made, to be reprinted, and 1,250 copies supplied to perfect the work to that time: such sheets to be included in the 2,400 pages to be annually published, or otherwise to be charged at the same rate.'

In a supplementary paper of observations Mr. Bigg submitted the following matters :—

"1st. 'That any new edition of existing statutes should be circulated to the same extent as the current statutes. According to the latest information I have been able to obtain, 2,230 copies of the foolscap folio edition of the current statutes are supplied to Government at three farthings per sheet of four pages, for the use of the legislature, public offices, and courts of justice ; in addition to 1,905 copies of the 4to. edition printed for the use of resident acting justices of the peace ; making together 4,135 copies of the current statutes circulated at the public expense.'

'The cost of 4,135 copies of the post 8vo. edition at 9d. per 96 pages would be—per copy, 2s. 9½d., and for the 4,135 copies, £581 19s. 8½d.—being £233 7s. 2½d. less than the sum paid for 2,230 copies of the foolscap folio edition. This comparison assumes that in both editions the statutes of the session are printed without abridgment and with tables and indexes complete.'

"2nd. 'That any edition of statutes published with the aid of Government should be accessible to the public by purchase at a moderate price. To meet this suggestion I should be willing to stipulate that the proposed edition should be kept constantly on sale in single copies, at a price per copy one-third higher than the price paid for the copies purchased by Government.'"

Mr. Bigg then makes some strictures on the existing mode of framing and editing the statutes, and gives some instances of indirect references to statutes passed in 1859, and points out how these should have been avoided. He then gives a startling list of public acts affected by the statutes passed last session, which are omitted in the Chronological Table appended to the statutes at large. For these we must refer to pp. 17—22 of the Explanatory Preface to the Work. Mr. Bigg then attacks the validity of the Queen's printer's patent so far as relates to the exclusive right of printing acts of Parliament.

The point of most practical interest to our readers is the one which appears to have come out very gradually by means of Mr. Bigg's persevering efforts—namely, that any edition of the public statutes may be referred to by counsel and the judges, and that it is not necessary to have a Queen's printer's edition.

We have examined Mr. Bigg's specimen volume of the "Proposed Complete Edition of the Existing Statutes," and it certainly appears to us that in point of convenience, price, and completeness, it is much preferable to the present system, and we feel little doubt that if the issue depended on these points alone the verdict would be in favour of Mr. Bigg ; but there are weighty pecuniary interests involved in the proposal, and, as if this alone were not enough, there is the old enemy, routine, prepared to give a dogged resistance to any change, and we much fear that Mr. Bigg will find these too powerful for him, at least for the present.



**BIGG'S RAILWAY ACTS.**

*A Collection of the Public General Acts for the Regulation of Railways: including the Companies Lands and Railways Clauses Consolidation Acts, 1838—1859, with General Index. Eighth Edition. Westminster: Waterlows.*

The above work is edited by Mr. Bigg, and the fact that seven previous editions have been exhausted, will indicate that the volume is found to be useful to those who are concerned in railway matters. It has a very full index, which would of itself be an acquisition, as being a safe guide to the existing statutes, and referring to them, and not to the pages of Mr. Bigg's work.

**BIGG'S STANDING ORDERS, 1860.**

*The Standing Orders of the Lords and Commons (for Session 1860) relative to Private Bills; with Appendix, containing Table of Fees charged at the House of Commons, Standing Orders of the House of Commons relative to Public Matters, and other information respecting the Proceedings necessary to be taken by the Promoters and Opponents of Bills; and with copious Indexes. Westminster: Waterlows.*

The title of this work speaks for itself. For those engaged in parliamentary proceedings it must be indispensable, and Mr. Bigg's introductory statement of the alterations and amendments of the standing orders during the last session will be particularly useful.

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## Summary of Decisions.

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**EQUITY AND CONVEYANCING.**

**FEME COVERT.**—*Breach of trust—Separate estate without power of anticipation.*—The following decision is in accordance with the rules adopted by courts of equity as to the separate estate of married women—namely, that where there is no clause against anticipation, it is liable to make good the misfeasanances of the married woman, but that if there be a clause against anticipation this cannot be done as to future income to arise from the separate estate. A married woman who was an annuitant under a will for life, for her separate use, without power of anticipation, was appointed executrix; but failing in obtaining probate, took possession of and misappropriated the estate. In an administration suit asking the usual accounts against her, but not referring to her separate estate: Held, that the arrears of the annuity were applicable to make good her misfeasanances, but not the accruing payments. *Pemberton v M'Gill*, 8 Week. Rep. 290.

**FEME COVERT.**—*Equity to settlement—Settlement of the whole fund—Assignee of husband* [see ante, p. 64, and add a reference to the following].—Where a married woman whose husband has become bankrupt is entitled

to a fund under £200, the court will settle the whole fund upon her, notwithstanding that she has encumbered such share. But (which is an important point frequently overlooked) in case she dies without children, the assignee of her husband is entitled. *In re Tubb's Estate*, 8 Week. Rep. 270.

**FELONY.**—*Trustee and cestuis que trust.*—We have elsewhere (Com. L. Princ. pp. 1, 2) stated that where an act amounts to a felony the private remedy is in general suspended until after prosecution: this doctrine was recognised in the following case, where it appeared that A. committed a forgery upon a banking company (B.), was prosecuted by them, and a true bill found against him by the grand jury. At the same assizes A. was tried upon another indictment for forgery upon another banking company (C.), to which he pleaded guilty, and received sentence of penal servitude. The judge directed B.'s indictment, to which A. had pleaded "Not guilty," to stand over, as justice was satisfied by the sentence already passed upon A. Previous to conviction A. had assigned all his estate for the benefit of his creditors: Held, that the banking company (B.) were entitled to prove as creditors of A. under this assignment for the amount paid by them upon the forged cheque, and that they had not forfeited their right by abstaining from pressing for an actual conviction upon the indictment preferred by them. *The Dudley and West Bromwich Banking Company v. Spittle*, 8 Week. Rep. 351.

**FORFEITURE.**—22 & 23 V. c. 35, s. 4—*Retrospective operation of statute*—*Relief against breach of covenant to insure*—*Costs.*—This is a decision on the provision in Lord St. Leonards' Act respecting a breach of a covenant to insure (see 1 L. C. N. S. 323, 326). The court has power under the 4th section of 22 & 23 V. c. 35 to grant relief against a breach of covenant to insure, though that covenant was entered into previously to the passing of the act. The party who is restrained from enforcing the right of forfeiture is *prima facie* entitled to his costs in equity, but they will be refused if he makes a vexatious defence. *Page v. Bennit*, 8 Week. Rep. 339.

**LEGACY.**—*Bequest of railway shares*—*Calls*—*Liability of specific legatee of shares to pay calls.*—In the following case, V. C. Kindersley laid down a rule with respect to bequests of railway shares, to the effect that where a testator bequeaths shares, and there remains any payment to be made to constitute the legatee a complete shareholder, that ought to be made out of the testator's estate, but that calls made subsequently to the testator's death on shares of which the testator was complete owner should be borne by the legatee. The testator left "to his son H. any shares in railways, mines, and other undertakings, that might belong to him at his decease:" Held, that this bequest imposed upon the legatee the onus of paying all calls accruing due subsequently to the testator's death. *Day v. Day*, 8 Week. Rep. 288.

**MISREPRESENTATION.**—*Mortgage—Advance on faith of an illusory grant—Suit for repayment—Remedy in equity—Concurrent jurisdiction.*—The following is a case of importance as to the effect of a misrepresentation by a person of a fact which ought to have been within his knowledge. It was

attempted to be argued that courts of equity will not give relief in cases of misrepresentation, where there was no privity between the party making the misrepresentation and the party damaged thereby; that in the cases where relief had been afforded there existed a fiduciary relation and corresponding duty arising thereout; and, therefore, the misrepresentation involved a breach of duty on the part of the trustee, as it is his special function to know the truth of what he represents. Where this fiduciary relation did not exist, it was contended that the only remedy was at law; but the court of appeal decided otherwise, holding, indeed, that there was a remedy at law, but deciding that the case belonged to the class in which courts of law and of equity have a common jurisdiction. The doctrine of Lord Eldon, in *Evans v. Bi.* (6 Ves. 174), was referred to, to the effect that it is a very old head of equity that if a misrepresentation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good. The court also referred to the doctrine we have elsewhere stated (F. Bk. 281), that the assumption by a court of law, of jurisdiction over any subject-matter of equitable jurisdiction, does not take away the latter jurisdiction: that can be done only by express statutory enactment. It appeared that A. agreed to advance £300 to B. on security of certain property in Middlesex, a lease of which, at a peppercorn rent, B. represented was about to be granted to him by C., the landlord. C. also wrote at B.'s request to A.'s solicitor to the same effect. Shortly afterwards, C., knowing (as alleged) that A. was about to advance the money on that security, executed a lease of the property to B.; and on the faith of the assurance and letter, and of the lease so granted, A. advanced the money; and a mortgage to him by way of underlease was executed by B. A. afterwards discovered that C. had, a few months before, executed a lease of the same property to B., who had mortgaged it to another person. That lease had been registered. A. accordingly filed a bill against B. and C. for repayment of the money. B. was then insolvent. C. alleged in his answer that he had forgotten the lease at the time of his execution of the second, and that no part of the £300 came to his hands: Held, that the case was within the jurisdiction of the court, and that A. was entitled to a decree against C. for repayment of the £300 and interest. *Slim v. Croucher*, 8 Week. Rep. 348.

**PARTNERSHIP.**—*Partnership assets—Interest—Current account.*—It is settled that interest cannot be claimed, except by an express or implied contract, or by the operation of the law of custom and dealing (*Denton v. Ro.*, 3 Campb. 493), or by statute. As to implied contracts, none of the authorities go beyond this, that, if by an instrument a given day be fixed for payment, the court has implied from that a contract to pay interest from and after that day. In the following case it appeared that a business was carried on in partnership, without any written articles, by A. and B., and, after the death of B., by his executor C. The amount drawn from the partnership by C. exceeded that drawn by A. by £2,000, which remained as a debt due to A. at the time of his death: Held, in the absence of either

express or implied contract to that effect, or of evidence as to the course of dealing, that this debt did not bear interest. *Rhodes v. Rhodes*, 8 Week. Rep. 204.

**PATENT.**—*Inspection—Taking samples for analysis—Jurisdiction.*—The following case shows how much further courts of equity will go than courts of law in following up the right of inspection by directing a dealing by way of analysis or otherwise, with the articles to be inspected, so as to furnish full means of information. In an action commenced by A. against B., the proprietor of a newspaper, for an alleged infringement, in the type used in printing the paper, of A.'s patent, the Court of Exchequer refused to grant an order for the delivery to A. of a portion of the type, for the purposes of analysis. Having subsequently filed a bill in equity against B., an order was made for inspection and the delivery of a competent portion of the type for the purposes of analysis. Observations upon the jurisdiction of a court of equity to grant inspection in patent cases, and as to the necessity of antecedent proceedings to enable the court to grant a perpetual injunction at the hearing. *The Patent Typefoundry Company v. Walter*, 8 Week. Rep. 353.

**POWER OF ATTORNEY.**—*Power to mortgage—Payment to agent.*—The following case is one of some importance, as to the effect of a power of attorney containing general words. A. gave to B. a power of attorney to receive his rents and official salary, &c., and to act generally in his affairs as fully as he himself could: Held, that this power, taken together with certain correspondence, authorised a mortgage of policies. B., an agent under a general power of attorney, had in his possession certain moneys of C., and also two policies belonging to A., his principal. B., representing that he acted by the direction of A., borrowed a portion of those moneys, and assigned one of the policies as security; but he never paid any portion of the money to A.: Held, that as between A. and C., there was a good payment to A. *Perry v. Holl*, 8 Week. Rep. 291.

**PUBLIC COMPANY.**—*Lands Clauses Act—Equitable tenant for life—Trustees—Conveyance.*—The 7th section of the Lands Clauses Act does not enable an equitable tenant for life to convey to a railway company without joining those parties in whom the legal estate is vested. *Lippincott v. Smyth*, 8 Week. Rep. 336.

**PUBLIC COMPANY.**—*Winding-up Acts—The Statute of Limitations runs against a simple contract creditor of a company which is being wound up under the Winding-up Acts.*—After an adjudication of bankruptcy, the statute of limitations will not run, so as to bar by subsequent lapse of time, the creditor's right to prove (Exp. Ross, 2 Gl. & J. 46, 332). In the following case it was contended that an order for winding-up a company had a similar effect, but V. C. Stuart considered it to be against the whole policy and scope of the Winding-up Acts to treat the assets coming to the hands of the official manager as if they were to be dealt with on the footing of that trusteeship which is recognised in bankruptcy. The facts were that F., in the year 1846, was the holder of a debenture note of a bank, which was

payable in February, 1850. A winding-up order against the bank was made in July, 1850. The debts were all paid before the end of the year 1857, and a dividend out of the assets was returned to the contributories. In November, 1859, for the first time, F. filed an affidavit in support of a claim in respect of the debenture note: Held (confirming the decision of the master), that the claim of F. was barred by the statute of limitations. *Re Forrest*, 1 Law Tim. Rep. N. S. 447.

SCOTCH LAW.—22 & 23 Vict. c. 63—*Power of the Court of Chancery to send a case to Scotland.*—By the 22 & 23 V. c. 63, if in any judicial proceeding it is thought necessary or expedient to ascertain the law applicable to the case, as administered in any other part of her Majesty's dominions where the law is different, a case may be prepared and settled, and an order made to remit it to the court whose opinion is desired (1 L. C. N. S. 359—361). It has been decided that where the Court of Chancery, for the purpose of disposing of a case depending before it, thinks it expedient to send a case to any other court in the Queen's dominions, where a different law is administered, it can, in its discretion, do so. Such case must state shortly, but sufficiently, all the facts, and the foreign court would, *prima facie*, act in the same manner with respect to it as courts of common law in this country would do upon a case sent under the old practice. *Lord v. Colvin*, 8 Week. Rep. 201.

TRUST.—*Investment—New East India Loan*—22 & 23 Vict. c. 35, ss. 30, 32.—The following is a decision on Lord St. Leonards' Act, the 22 & 23 V. c. 35 (see 1 L. C. N. S. 324, 333). The court will in no case authorise trustees to invest trust money in the New East India Stock. *Re Fromow's Estate*, 8 Week. Rep. 272.

#### EQUITY PRACTICE.

COSTS.—*Taxation—Dismissal of bill in part—Interrogatories—Account—Fraud.*—The following case shows the difficulty which often arises in the taxation of costs where a bill is partially dismissed with costs. There, so much of a bill for an account against trustees, and to have various sums claimed by them disallowed, as charged fraud, was dismissed with costs, and accounts were directed. The master, in taxing the defendant's costs, had refused to allow to the plaintiff any costs whatever in respect of the interrogatories, answer, or production of documents; considering that all these items were unnecessary upon a mere bill for an account: Held, that the master was not justified in disallowing these items without distinguishing those portions which related to the part of the bill which had not been dismissed, and as to which his certificate was sent back for review. *Heming v. Leifchild*, 8 Week. Rep. 352.

COSTS.—*Taxation—Three counsel's fees—Appeal—Great additional evidence and increased briefs.*—The general rule, that upon a taxation between party and party the costs of two counsel only can be allowed as against an adverse party will not be departed from except upon very special circumstances. The plaintiff obtained a decree from which the defendant

appealed. Upon the hearing of the appeal, which occupied seven days, and in which the briefs were nearly doubled in size, the plaintiff employed three counsel. Upon taxation of the plaintiff's costs as between party and party: Held, that the costs of two counsel only could be allowed, and the certificate of the taxing-master referred back to him for review in this particular. *Pearce v. Lindsay*, 8 Week. Rep. 354.

**MOTION FOR DECREE.**—*Right to read answers.*—On motion for decree a defendant is not entitled to read his answer against the plaintiff without notice, but a plaintiff is entitled to read a defendant's answer against the same defendant without notice. A defendant is entitled to read his whole answer against the plaintiff without notice, if the plaintiff reads any part of such answer. A plaintiff cannot read the answer of one defendant against another without notice. A defendant cannot read the answer of another defendant against the plaintiff without notice. *Stephens v. Heathcott*, 8 Week. Rep. 336.

**PUBLIC COMPANY.**—*Infant—Guardian ad litem—Railway company—Trustee—Costs.*—When an infant appears upon a petition for the investment of trust funds in which he is interested, the special appointment of a guardian ad litem is necessary. Where a petition is presented for the investment of the proceeds of railway purchase-money, the produce of trust estates, the trustees being made respondents in such petition, are entitled to their costs as against the company. *In re The Duke of Cleveland's Harte Estate*, 8 Week. Rep. 336.

**PUBLIC COMPANY.**—*Purchase money of entailed estate—Payment out of court—Disentailing deed.*—Where the purchase-money of an entailed estate is of small amount, the court will order it to be paid out without requiring a disentailing deed. *Sowry v. Sowry*, 8 Week. Rep. 339.

**TRUSTEES.**—*Trustee Relief Act—Tenant for life in remainder.*—When a fund which has been paid into court is settled on two successive tenants for life, an order may be made for payment of the dividends to the first tenant for life, and, on proof of his death, to the second, without any further petition. *Re Brent*, 8 Week. Rep. 270.

#### COMMON LAW.

**EVIDENCE.**—*Estoppel—Invoice—Parol evidence to explain terms of.*—The general rule is that parol evidence is not admissible to vary the terms of a written contract, or to show that one of the parties to it was not a contracting party; but it may be shown by parol evidence that a document, even purporting on its face to be a complete and formal contract between the parties, never in fact was a contract at all (*Pym v. Ca.*, 25 L. J. Q. B. 274; *Ferness v. Me.*, 27 L. J. Ex. 35). The following case shows that this is applicable to an invoice of goods, it having been held that it is competent to a party whose name appears at the head of an invoice as the vendor of certain goods, to show that he was not the seller, and that the invoice was only made out in those terms, and included those goods for the convenience of the real parties to the contract. *Holding v. Elliott*, 8 Week. Rep. 192.

**FALSE IMPRISONMENT.**—*Arrest—Search-warrant—Reasonable and probable cause.*—A direction in a search-warrant to arrest the person in whose custody the goods alleged to be stolen are, is consequent upon the warrant. It appeared that the defendant, a miller, having seen some sacks with his marks made up in some packages of waste, the property of the plaintiff, went and made an information before a magistrate and obtained a search-warrant. The warrant, in the usual form, directed a constable, if he found any of the informant's property, to arrest the plaintiff. The plaintiff was accordingly taken into custody, but the case was afterwards dismissed, and the plaintiff brought this action. At the trial the judge held there was reasonable and probable cause for obtaining the search-warrant, but not for the arrest if it was not necessarily involved in the other: Held, that the warrant to arrest was issued as a matter of course as a part of the search-warrant, and the defendant having reasonable and probable cause for laying the information in the first instance, was not responsible in damages for the subsequent arrest. *Wyatt v. White*, 1 Law Tim. Rep. N. S. 517; 8 Week. Rep. 307.

**GUARANTEE.**—*Release of surety by act of party guaranteed—Neglect to perform act undertaken by principal.*—If a party guaranteed does any act injurious to the surety, or inconsistent with his right, or omits to do any act which his duty enjoins him to do, and the omission prove injurious to the surety, the latter is discharged. A. entered into a contract with B. to prepare certain fittings for a warehouse; one of the conditions of the agreement was, "B. shall and may insure the said fittings from accident by fire." C. agreed to become security for the due performance of the contract by A. Before he signed the guarantee he was told he ran no risk, as B. was bound to insure against fire. After a large quantity of the fittings had been completed, they were destroyed by fire. B. had neglected to insure: Held, that his neglect to do so had discharged the surety. *Watts v. Shuttleworth*, 1 Law Tim. Rep. N. S. 515.

**JUSTICES.**—*Summary Proceedings Act—Case* [see Dict. pp. 96—98; 4 L. C. 142—144; 6 *Id.* 97, 125].—Justices cannot be called on to grant a case on summary proceedings before them to enforce payment of a rate, where an appeal against the rate lies to the quarter sessions, and the only objection raised is as to the validity of the rate, on the ground that the party derives no benefit from the works for which it was made. *Reg. v. Justices of Gloucestershire*, 1 Law Tim. Rep. N. S. 294.

**LANDLORD AND TENANT.**—*Tender to one joint tenant of compensation—Contract.*—In 2 Bl. C. 183, it is said that any joint tenant is not capable by himself of doing any act which may tend to defeat or injure the estate of the other; and this was attempted to be applied to cases of contracts, though Blackstone was evidently referring to estates. It appeared that the defendants (co-tenants) were let into possession of land under an agreement to give up possession at any time on payment of a fair equivalent for the crop: Held, that a tender to one co-tenant only of compensation for the crop was a sufficient tender to the others, so as to entitle the land-

lord to maintain ejectment. *Loddiges v. Lister*, 1 Law Tim. Rep. N. S. 548.

**MARRIAGE CONTRACT.**—*Promise of marriage—Plaintiff's engagement to another person.*—Precontract is not, since the 4 G. 4, c. 76, any ground for the avoidance of a subsequent marriage with another person. Accordingly, it was decided in the following case that the existing engagement of the plaintiff to another person, of which the defendant was ignorant at the time of an agreement by the plaintiff and defendant to marry, is no defence to an action on the agreement. *Beachey v. Brown*, 8 W. R. 292.

**NOTICE OF ACTION.**—*False imprisonment—Malicious trespass*, 7 & 8 G. 4, c. 30.—By the Malicious Trespass Act, persons found committing the offence may be arrested; and before bringing an action in respect of any arrest, notice of action must be given. On a Sunday night a female who occupied a house, the property of the defendant, saw one of two men who were together, throw a stone at the window. She sent for the defendant, told him, and described the two men, saying it was the one with the stick did it. The defendant followed and arrested both. The plaintiff was the man who held the stick, and who had actually thrown the stone: Held, that the defendant was entitled to notice of action, under sect. 41 of the statute. *Jones v. Howell*, 1 Law Tim. Rep. N. S. 330.

**NUISANCE.**—*Highway—Quarry in waste land near to—Duty to fence.*—In *Barnes v. Ward*, 9 C. B. 392, it was decided that when a public nuisance is created, and an individual suffers an injury, he may maintain an action in respect of such injury, though he may by an accidental act have become a trespasser. Where the defendants were owners of waste which was bounded by two highways, and in which there was a quarry worked by their licensees, and the plaintiff, not knowing of the quarry, passed over the waste in the dark to get from one road to the other, and fell into the quarry: Held, that no duty was cast upon the defendant to fence, as the digging the quarry did not amount to a public nuisance within the principle laid down in the above case of *Barnes v. Ward*. *Hounsell v. Smith*, 8 Week. Rep. 277.

**PATENT.**—*Assignment of parts of—Action by assignee—Plea in abatement—Infringement—Nonjoinder of parties.*—In the following case two points of some novelty were considered—namely, first, whether the assignment of a part of a patent to an assignee would be valid; and secondly, whether, if valid, the assignee of a part is liable to be defeated in his action because he has not joined others having an interest in the patent, but no interest in the particular damages. It was held that a part of a patent, separate and distinct from other parts, may be assigned, and the assignee may sue in respect of an infringement of such part without joining as plaintiff parties having distinct interests in the other parts, but no interest in the damage sought to be recovered. *Dunnichiff v. Mallet*, 1 Law Tim. Rep. N. S. 51.

**PATENT.**—*Extension—Principles on which extension is granted—Accounts—Assignee.*—To obtain the extension of a patent the applicant must show its merits, the endeavours of the parties interested to bring it out, and their



failure to obtain an adequate remuneration. For this purpose satisfactory accounts must be produced and verified. An extension will be granted to the assignee of a patent on an adequate remuneration being secured to the patentee. *In re Markwick's Patent*, 8 Week. Rep. 838.

## COMMON LAW PRACTICE.

**ARBITRATION.**—*Reference*—*Legal adviser being present to assist the arbitrator.*—The following case shows that the parties to a reference may preclude the arbitrator from calling in legal assistance. Thus, in a reference where it has been agreed between the parties that the arbitrator was to decide upon the matters in dispute irrespective of legal questions, and that no lawyer was to be called in, the arbitrator has no right to have his own private attorney with him, to advise or take notes, if either party objects. *Proctor v. Williams*, 8 Week. Rep. 190.

**INTERPLEADER.**—*Claim by an insolvent*—*Security for costs.*—Where an insolvent claimed goods and furniture which he had deposited in the hands of the defendant as against his own assignee, on the ground that they belonged to him in the character of executor, and to recover which the assignee brought the present action: Held, that an interpleader order, in which the insolvent was directed to be plaintiff, the assignee defendant in an issue was rightly made without calling upon the insolvent or the defendant in the original action to give security for costs. *Ridgway v. Jones*, 8 Week. Rep. 185.

**NEW TRIAL.**—*Seduction*—*On affidavits and against the weight of evidence.*—The court will be especially careful not to grant new trials in actions of seduction and cases of that description, unless almost compelled and the interest of justice require it. *Walker v. Entwisle*, 1 Law Tim. Rep. N. S. 553.

## BANKRUPTCY.

**ASSIGNEES DEFENDING SUIT IN CHANCERY.**—*Bankruptcy Consolidation Act, sect. 153*—*Power of court under—Order to defend nunc pro tunc.*—By s. 153, Bankruptcy Consolidation Act, 1845, assignees may by leave institute or defend actions or suits which the bankrupt might have commenced or defended; the leave is not essential, but a matter of costs. It has been held that under the above section the Bankruptcy Court has no power to make an order nunc pro tunc for assignees to defend a suit in Chancery to which they were made parties, after the suit has terminated. *Anon.*, 1 Law Tim. Rep. N. S. 526.

**BILLS OF SALE.**—17 & 18 V. c. 36—*B. L. C. A. 1849, s. 125*—*Apparent possession—Reputed ownership.*—Though the following decision is only what was generally considered to be law, it is useful to have the matter put beyond doubt by judicial determination (see 2 Dav. Conv. 622, 2nd ed.; Roscoe's Ev. 787, 9th ed.). The Bills of Sale Act does not repeal the 125th section of the B. L. C. A. 1849; and therefore goods assigned by a duly registered bill of sale, if in the possession of the bankrupt, will be deemed to be in his order and disposition, and may be sold for the benefit

of his creditors under the bankruptcy. *Budger v. Shaw*, 1 Law Tim. Rep. N. S. 323.

**PROOF OF DEBT.**—*Promissory note—Innocent holder for value.*—By the Joint Stock Companies Act, 1856, s. 43, a promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company registered under that act, if made, accepted, or indorsed in the name of the company by any person acting under the express or implied authority of the company. In the following case Com. Holroyd held, that a promissory note, purporting upon the face of it to be made in favour of a joint stock company, with the company's seal affixed and by the company indorsed over, is proveable as against the company in the hands of an innocent holder for value, as having been so indorsed under the express or implied authority of the company for a legitimate purpose. *Re Dawe*, 1 Law Tim. Rep. N. S. 559.

**SURPLUS.**—*Bankruptcy Consolidation Act, 1849, s. 195—Interest—Priority amongst creditors.*—By s. 195 of the Consolidation Act, after payment of 20s. in the pound and interest, the surplus may be ordered to be paid over to the bankrupt; the interest is to be paid to the creditors mentioned in the act, and in the order there referred to—namely, first, creditors whose debts are by law entitled to carry interest; secondly, all other creditors who have proved. In the following case it appeared that the proofs were on—1, judgments; 2, bills of exchange not purporting on the face to bear interest. It was held, that in case of a surplus coming to a bankrupt under the 197th section of the Bankruptcy Act, 1849, judgment creditors are entitled to be paid interest upon their judgments before creditors upon bills of exchange can receive any, these latter being included in the second class under the words of the section “all other creditors.” *Thirnthwaite v. Pickering*, 35 Law Tim. Rep. N. S. 526.

#### CRIMINAL LAW.

**TURNPIKE TOLL.**—*Agricultural produce—Milk*—3 G. 4, c. 126, s. 32.—Milk does not come within the meaning of the words “or other agricultural produce” in sec. 32 of the 3 G. 4, c. 126 (General Turnpike Act), so as to be exempt from toll. *Oran v. Gait*, 1 Law Tim. Rep. N. S. 326.

**FALSE PRETENCES.**—*Sale by sample—False representation of quality*—7 & 8 G. 4, c. 29, s. 53.—The following decision will, it is to be hoped, be considered as settling the doubts arising out of the doctrine relating to false pretences by misrepresentation, establishing that a misrepresentation of a definite fact is, whilst a misrepresentation of mere matter of opinion is not, a false pretence. The court held that a misrepresentation of a definite fact cognisable by the senses, as where a seller represents the quantity of coals to be fourteen cwt., whereas it is in fact only eight cwt., but so packed as to look more, or where the seller, by manœuvring, contrives to pass off tasters of cheese as if extracted from the cheese, offered for sale, whereas it was not, is a false pretence, indictable under the 7 & 8 G. 4, c. 29, s. 53. *Watson v. Goss*, 1 Law Tim. Rep. N. S. 337.

**HIGHWAY.**—*Obstruction*—*Householder's right to temporarily obstruct highway or footway*—*Power of gas companies to lay down pipes.*—In the following case the court, admitting the existence of a right in a householder to make such slight temporary obstructions on a highway or footway as necessarily incidental to the enjoyment of his property, such as the obstruction caused in using the common coal-holes in the pavement, the unloading of carts, the putting up hoards for the purpose of repairing, &c., denied that this would extend to justify either a private person, or anybody acting at the request of private persons, to open the streets for the purpose of supplying private houses with gas or water. The members of a gas company, having parliamentary powers to open streets for the purpose of public lighting, but having no similar powers for the purpose of conveying gas to private houses, are liable to be convicted for a nuisance, in obstructing the highway, if they open the streets in order to lay down service pipes from the mains already laid down by them for public lighting to the houses of the adjacent inhabitants. An inhabitant who directs such service pipes to be laid down to his house is also similarly liable. *Reg. v. Joseph Knight and others*, 8 Week. Rep. 293.

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## Vendors and Purchasers.

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**EVICITION.**—*Improvements*—*Damages on breach of covenant for title.*—A piece of building land was purchased and several houses erected upon it. The purchaser was afterwards evicted. Under the covenants for title in the purchase deed: Held, that the purchaser was entitled to damages, and that the amount must be determined by the sum expended in converting the land to the purposes for which it was purchased: Held, also, that the estate of the vendor was liable to make good the amount, and that legatees under his will must contribute to make up the requisite sum. *Bunny v. Hopkinson*, 29 Law Journ. Ch. 93.

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## Moot Points.

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No. 28.—*Devise*—*Fee or tail*—*Heirs of the body of the testator.*

A testator devised his real estates to his eldest son and the heirs of the body of the latter; and on failure of such issue, to his the testator's heirs of his body; and for default of such issue, over to his the testator's uncle. The first son died, without issue, in the testator's life: what estates do his other children, several of whom survived him, take? The will is an old one, and the testator was seised in fee, and disposed of such fee simple to strangers.

M. J. N.

No. 29.—*Limitation to Bar Dower.*

A., by deed executed since the Dower Act, conveys land to B. to uses in

the following words: "To hold the premises unto the said B. and his assigns during his natural life, without impeachment of waste; and after the determination, &c., to the use of C. and his heirs during the life of B., in trust for him and his assigns; and after the determination of the estate lastly hereinbefore limited, remainder to B. in fee." Then follows a declaration against dower. B. was married before the Dower Act, and his wife is now living. Are the limitations, as stated, sufficient to bar dower; and would not a purchaser from B. be entitled to have B.'s wife joined in the conveyance to release her right dower? But if this is not the case, would not C. have an absolute legal estate for the life of B. (subject of course to the equity)? The words in the habendum—"during his natural life, without impeachment of waste, and after the determination," &c.—are, I imagine, simply superfluous. I shall be glad to have reference to authorities.

T. G. S.

No. 30.—*Summary Proceedings on Bills of Exchange.*

A bill of exchange, dated in 1858, was made payable "after demand," and in last March the holder applied to the acceptor for payment, which was the first demand made: can the holder proceed against the acceptor under the act authorising summary proceedings on bills and notes? Would it have made any, and what, difference if the bill had been payable "on demand," and no demand made before writ issued.

LEG., JUN.

No. 31.—*Lien—Action—Judgment.*

A. deposited goods with B. as a security for the sum of £100 borrowed by A. from B. The latter has brought an action and recovered judgment, but objects to have the goods deposited with him seized on a *fi. fa.*, expecting to be paid otherwise. Since the judgment, A. has commenced an action against B. to recover the goods deposited. Has B. any defence to such action.

H. B. B.

No. 32.—*Contract—Taking Possession.*

A purchaser being aware of certain objections to the title, offered to waive them on having a declaration as to certain facts, which is promised. Before the declaration is furnished, the purchaser applies to be let into possession, and the vendor gives him possession accordingly. Subsequently the parties cannot agree to the terms of the declaration, the purchaser insisting on a more ample one than the vendor can furnish. Is not the purchaser by taking possession precluded from objecting to the title, especially as it turns out that the vendor cannot possibly supply a more complete declaration, though neither the vendor nor the purchaser was aware of this at the time of the possession being given and taken?

W. H. S.

No. 33.—*Copyholds.—Admission of Tenant for Life—Remainderman.*

The steward of a manor alleges, that, by special custom, a remainderman must be admitted and pay a fine, although the tenant for life has been admitted and paid a fine, which fine was stated to be for *his* admission,

and in the admission no reference was made to the remainder. The point upon which I ask the opinion of your readers is, whether, where a tenant for life has been admitted, expressly for life and without reference to any remainder, and a fine is assessed "for such admission," the remainderman can be called on to pay another fine (and of what amount) where the custom is special—i. e., for a remainderman to be admitted? I contend that in such a case the steward ought to state the whole fine, and apportion it between the tenant for life and remainderman, and that if he does not, the fine paid by the tenant for life is a full fine, and that no other fine can be exacted on the remainderman being admitted. Admitting, however, that a fresh admission and a fine are indispensable, cannot the remainderman, without being admitted, join the tenant for life in making a present surrender to a purchaser, and will not the latter be at once entitled to admission on payment of the fees of one admission only; and, if so, what will be the effect of the subsequent death of the party who was tenant for life?

H. G. S.

No. 34.—*Apprentice—Wages.*

A tradesman takes an apprentice, and in the indentures of apprenticeship it is provided that the wages of the apprentice shall be raised at the end of each year of his apprenticeship. In the course of the first year the apprentice is ill, and unable to work for a month. At the end of the current year ought his wages to be raised at once or a month afterwards?

E. J.

No. 35.—*Deposit—Forfeiture.*

In conditions of sale it is usually stated that if the purchaser shall fail to comply with those conditions his deposit shall be forfeited, and the vendor may re-sell, and the deficiency occasioned by the second sale shall be made good by such defaulter. On such a case happening in practice, is the forfeited deposit applied towards paying off this deficiency? or is the deposit absolutely forfeited, and the "deficiency" calculated solely as the difference between the first and second sale?

E. J.

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## Answers to Moot Points.

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No. 154.—*Succession Duty—Appointment to Child* (Vol. 1, N. S., p. 384).

The question does not state whether the father made the appointment during his lifetime or by will, and I am at a loss to understand what the 16th section has to do with the present case. If the father, being the donor of the property, appoints to his children during his lifetime, by which appointment the children take an immediate estate in the property, I consider they are not liable to succession duty, but if the father exercises the power by will, whereby the children take a beneficial interest upon the death of the father, I think succession duty would attach.

E. S.

## Summary of Decisions.

### EQUITY AND CONVEYANCING.

**BUILDING SOCIETY.**—*Mortgage—Redemption—Fleming v. Self.*—By a rule in a benefit building society a member who had purchased or received in advance his shares might redeem his mortgage on payment of the difference between the amount of profits and subscriptions paid and the amount expressed to be secured by the deed. In taking the accounts in a redemption suit by a purchasing or borrowing member, credit was given to him for the redemption or interest moneys paid by him; and on appeal by the trustees, this was held to be correct according to the decision in *Fleming v. Self* (3 De G. M. & G. 997), by which the court considered itself bound. *Smith v. Pilkington*, 29 Law Journ. Ch. 227.

**PUBLIC COMPANY.**—*Lands Clauses Consolidation Act—Damage—Substitution of buildings—Costs of investment.*—A railway passed through a farm and divided it so that the buildings could not be conveniently used for one part of the farm: Held, that it was an injury within the meaning of the 8 & 9 V. c. 18, s. 69, which required the substitution of other buildings, and that the compensation paid for the damage might be applied in the erection of new buildings upon that part of the farm which required them: Held also, that the application for the sanction of the court was not within the 8 & 9 V. c. 18, s. 80, and that the railway company was not liable to pay the costs, but that the costs, exclusive of those of the railway company, must be paid out of the fund in court. *In re The Oxford, Worcester, and Wolverhampton Railway Company, Ex parte The Devises of Milword*, 29 Law Journ. Ch. 245.

### PROBATE AND DIVORCE.

**WILL.**—*Due execution inferred the memory of the attesting witnesses being imperfect*—1 V. c. 26.—Where a will appears on the face of it to have been duly executed, and the attesting witnesses are unable to say whether or not the testator had signed it when they subscribed their names, the court is at liberty to infer from the circumstances of the case whether or not the testator had previously signed. *Gwillim v. Gwillim*, 29 L. J. P. M. 31.

**DISSOLUTION OF MARRIAGE.**—*Discretionary bar—Unreasonable delay*—20 & 21 V. c. 85, s. 31.—The unreasonable delay in presenting or prosecuting a petition for dissolution of marriage which, under s. 31 of the Divorce Acts, gives the court a discretion as to dissolving the marriage, though the case of the petitioner has been proved, is delay, from which it would appear that the petitioner is insensible to the injury of which he complains. *Pellew v. Pellew*, 29 Law Journ. P. M. 44.

**ADMINISTRATION**—*With the will annexed—Executors—Corporation aggregate—Appointment of syndic.*—When a corporation aggregate has been appointed executor of a will, the court will, on motion, grant letters of administration, with the said will annexed, to a syndic, who has been duly appointed by such corporation to take the grant. The grant will not be

made until the appointment of the syndic is before the court. *Re Darke*, 8 Week. Rep. 273.

**JUDICIAL SEPARATION.**—*Petition for cruelty—Record withdrawn by consent—Motion to set cause down again for trial.*—On the trial of a wife's petition for judicial separation, by reason of her husband's cruelty, an arrangement was entered into, and memorandum signed by counsel of both parties, before the jury were sworn, for a referee to settle the terms of a separation by deed, with full power over the question of income. Subsequently the wife moved to re-enter the record, and set the case down for hearing. The court refused the motion, holding the wife bound by the agreement that the proceedings should be stayed, and the suit not moved, so long as she could show no breach of the terms of the agreement by the other party. *Hooper v. Hooper*, 1 Law Tim. Rep. N. S. 522.

**ADMINISTRATION.**—*De bonis non with will annexed—Substituted legatee—Limited grant refused.*—Where the residue is undisposed of by a will and administration is requisite, the next of kin of the testator are entitled to a general grant. An application for a grant of administration de bonis non (with the will annexed) to a substituted universal legatee, limited to £750 stock, in which she was solely interested, on an affidavit that the parties entitled to a general grant were more than nine in number, that their residences were widely apart, and that their service with a citation would be attended with great difficulty and expense, refused: Held, that the court will not give a limited grant, except upon strong reason shown. *Re Watts*, 8 Week. Rep. 340.

#### COUNTY COURTS.

**DEATH OF PLAINTIFF.**—*Before judgment delivered—Non-interference of superior courts with the decision of the judge of the county court.*—A cause was heard in the county court, and the judge took time to consider his judgment; before he delivered it the plaintiff died, and upon an application to him to deliver it nunc pro tunc he declined to do so, holding that the suit had abated. Upon an application to the superior court for a rule to direct him so to enter it, or to allow the administrator to enter a suggestion of the death, and go on with the plaint: Held, that the superior court could not interfere. *Henry v. Mason*, 1 Law Tim. N. S. 295.

**EXECUTION.**—*Interpleader summons—Rent.*—Goods in the custody of the law, as in execution, cannot be distrained (Co. Litt. 47 a.; *Peacock v. Pu.*, 2 B. & B. 362). The 19 & 20 V. c. 108 has made provisions relative to rent where goods are seized in execution by process from the county courts: the 8 Anne, c. 14, is declared not to apply to goods taken under such process, and the provisions are directed to the case where the goods levied on belong to the tenant. Where the goods of a third party are taken in execution under county court process on the premises of the judgment debtor, and the owner claims his goods, the landlord is not entitled to be satisfied the arrears of rent out of the proceeds of such goods, or to insist that his rent shall be paid before their removal. *Foulger v. Taylors*, 8 Week. Rep. 279.

## Moot Points.

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### No. 36.—*Intestacy—Power of Wife over Personal Property.*

When A. B. was an infant her father died intestate, leaving his wife and his only child A. B. The wife administered to his effects, being chattel property. In 1811 A. B. married C. D., no settlement being made previous to the marriage. The mother and A. B. never divided the property. In 1820 the mother advanced some of the property on a freehold mortgage, and died in 1842, intestate, the property descending to A. B. In 1855 the husband C. D. died, bequeathing this freehold mortgage to his eldest son, subject to a life interest in favour of A. B. Had C. D. that power, or may A. B. make a different disposition of it? E. S.

### No. 37.—*Accountant to the Crown, &c.*

J. S. is about selling some freehold property to B. J. S. is an accountant to the Crown. He is selling as representative of a mortgagee under a power of sale contained in the mortgage deed. He is beneficially interested in the purchase-money, but beyond this has no further interest in the property to make it liable to the Crown.

Under these circumstances, can the purchaser insist upon the vendor obtaining a release or "quietus" from the Crown by 2 & 3 V. c. 11?

T. P. TOMES.

### No. 38.—*Sale by Two of Three Trustees.*

A., B., and C. are trustees, in whom real property is vested. A. goes to America, and B. and C. sell the property, in which sale A. does not join. A. afterwards dies. In whom is the fee vested after A.'s death.

A. E. L.

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## Answers to Moot Points.

### No. 28.—*Devise—Fee or Tail—Heirs of the body of the Testator (ante, p. 110).*

If an estate be limited to a man, and the heirs of his body, it is an estate in tail general (See Watkin's Prin. Convey. 8th ed. p. 104). I think, therefore, that the testator's children take an estate in tail general. C. J.

### No. 30.—*Summary Proceedings on Bills of Exchange (ante, p. 111).*

It has been decided that the time runs from the date of such a bill as this; and, therefore, if six months be allowed to elapse no action can be brought under 18 & 19 V. c. 6 (see Leigh v. Baker, 26 L. J. 220, C. P. Brooks v. Mitchell, 9 M. & W. 15). I see no difference in their legal effect between the words "after demand" and "on demand."

W. PURCHAS, Jun.

### No. 32.—*Contract—Taking Possession (ante, p. 111).*

The rule appears to be that a purchaser by taking possession is



generally held by that act to have waived the objections to the title; but he must be shown to have had distinct information of the objection. The question in each case is one of fact—did the purchaser mean to waive? and has he actually waived his right of examining the title (see *Sug. V. & P.* 244, 245, and the cases there cited). In the present case the purchaser examines the title and objects to it, his objections are to be met by a declaration; the purchaser subsequently (with the consent of the vendor) enters into possession. The purchaser distinctly objects to the title, and by entering into possession did he mean to waive those objections? His conduct must certainly answer in the negative; during the whole proceedings his objections to the title still continued, and he only enters into possession on the condition of his objections being removed.

After considering the authorities I am of opinion that the purchaser is entitled to object to the title, and that he has not nor never intended to waive those objections. J. H.

No. 34.—*Apprentice—Wages* (*ante*, p. 112).

In *Cuckson v. Stones* (7 W. R. 184; 1 L. C. N. S. p. 44) it was decided that a master could not retain the wages of his servant during his temporary illness.

Acting on this principle, I am of opinion that the apprentice would be entitled to have his wages raised at the expiration of one year from the date of apprenticeship indenture (see *Smith's Law of Master and Servant*, p. 7; *Reg. v. Lord*, 12 Q. B. 757). J. H.

No. 34.—*Apprentice—Wages* (*ante*, p. 112).

If the indentures of apprenticeship provide that the wages of the apprentice shall be raised at the end of each year of the apprenticeship, without any condition being made therein as to the case of the apprentice being ill or unable to work for a portion of the year, I think (provided the illness be *bonâ fide*) the apprentice would be entitled to have his wages raised at the end of the current year. C. J.

No. 35.—*Deposit—Forfeiture* (*ante*, p. 112).

I do not think that conditions of sale usually state that if the purchaser fails to comply with the conditions his deposit shall be forfeited, but the usual condition I think is, that if the purchaser fails to comply with the conditions an order may be made for a resale, and for payment by the purchaser of the deficiency, if any, in the price which may be obtained upon such resale (see *Smith's Chan. Pract.* p. 1056, 6th ed.). In this case I presume the deposit would be first taken to make up the deficiency, and the residue of the deficiency, if any, paid by the purchaser. But if the conditions state that the deposit shall be forfeited, I should think that the purchaser would then have to make up the whole deficiency occasioned by a resale irrespective of the deposit already paid. C. J.

## Summary of Decisions.

### EQUITY AND CONVEYANCING.

**FEME COVERT.**—*Wife's chose in action*—*Deposit of deeds*—*Reduction into possession*.—Formerly the notion prevailed that a husband, having a present right to reduce his wife's chose in action into possession, by assigning it, was considered to have so reduced it; but this is not so now (see *Elwin v. Williams*, 13 Sim. 809; *Ashby v. Ashby*, 1 Coll. Ch. Cas. 553). And the following case confirms this:—Where a husband having right to reduce his wife's chose in action into possession attempted to assign it for valuable consideration by deposit of deeds, and the assignee did not reduce it into possession during the husband's lifetime: Held, that the wife's right by survivorship was not barred. *Micheltmore v. Mudge*, 8 Week. Rep. 429.

**FEME COVERT.**—*Equity to settlement*—*Settlement of the whole fund*—*Costs of assignee*.—Where on a petition for payment out of court of a fund to which a married woman is entitled, the assignee of the husband appears on such petition, not being a party to the suit, one set of costs only is allowed. Where such fund, after payment of costs, does not amount to £200, and it appears that the husband has received large sums in his wife's right, and is unable to maintain her, the court will settle the whole fund. *Ward v. Yates*, 8 Week. Rep. Ch. 428.

**MARRIAGE SETTLEMENT.**—*Construction*—*Next of kin of the wife*—*Period for ascertainment*—*Death of the husband*.—Where in the ultimate clause usually inserted in marriage settlements of the personal property of the wife, a trust in the event of her pre-deceasing her husband, without leaving issue, is declared for the benefit of the next of kin of the wife, if the instrument does not clearly express what class of next of kin are to take, the general rule is that the period for ascertaining the persons entitled is the death of the wife; if another time is intended, it ought to be specified, and then the general rule will not apply. Under a marriage settlement a certain fund was vested in trustees upon trust (among other things) in default of children of the intended marriage for the intended wife, if she should survive the intended husband; but, if she should die in his lifetime, then (subject to the life interest therein) in trust for such person or persons as the said intended wife should by will appoint; and for default of any such appointment in trust for such person or persons as at the decease of her, the said intended wife, would, under the statutes for the distribution of intestate's effects, have been entitled to her personal estate as her next of kin, in case she had survived her husband, and had afterwards died intestate, and to go in the same manner as the same would go under the said statutes. There were no children of the marriage who

lived to acquire vested interests : Held, that the wife having pre-deceased her husband, the period for ascertaining who were her next of kin was the death of the husband, and not the death of the wife. *Chalmers v. North*, 8 Week. Rep. 426.

## EQUITY PRACTICE.

**APPEAL.**—*Non-compliance with order.*—An order (among other things) directing that a sum of money should be brought into court was appealed against: Held, that the appeal could not be heard while the appellant disobeyed the order by not bringing the money into court. *Wood v. Farthing*, 8 W. R. 425.

**INFANT.**—*Motion—Infant plaintiff—Special inquiry—Next friend.*—The Court of Chancery favours suits by next friends for the benefit of infants, but it will in proper cases refer the question of the propriety and utility of the suit. In a suit of an infant plaintiff by her next friend against testamentary guardians and trustees, upon motion of the defendants immediately after putting in their answers, making out that there was no necessity for the suit, and that it was instituted against the will of the infant plaintiff, who was eighteen years old, a special inquiry was directed, whether any and what benefit had accrued to the infant from the institution of the suit. *Clayton v. Clarke*, 2 Law Tim. Rep. N. S. 302.

**PAYMENT OUT OF COURT.**—*Appeal pending, no ground for not paying out the money, but security ordered.*—Pending an appeal to the House of Lords from a decision of the Lord Chancellor, payment of the fund in court ordered to the party whose right to it had been established by the Lord Chancellor, upon her giving security for repayment in case the decision of the Lord Chancellor should be reversed by the House of Lords. *Monypenny v. Monypenny*, 8 Week Rep. 430.

## COMMON LAW PRACTICE.

**ARBITRATION.**—*Reference by order of nisi prius—Award in form of a special case—Error—C. L. P. Act, 1854, ss. 5, 32—Agreement not to proceed in error.*—By sec. 5 of the C. L. P. Act, 1854, an arbitrator may state his award in the form of a special case for the opinion of the court. Where a cause was referred by an order at nisi prius and by consent to an arbitrator, with a special provision that neither of the parties should proceed in or allege error, and the arbitrator made his award in the form of a special case for the opinion of the court under the 5th section of C. L. P. Act, 1854, and on the court deciding in favour of the defendant, the plaintiff took proceedings in error: Held, that the 32nd section of the C. L. P. Act, 1854, giving power to bring error on a special case, did not apply to a special case stated by an arbitrator under section 5 of the act, and that the parties were bound by their agreement not to proceed in error. *Gunn v. Fowler*, 2 Law Tim. Rep. N. S. 282; 8 Week. Rep. 436.

**COSTS.**—*Taxation—Issues—Arrest of judgment.*—By the C. L. P. Act, 1852, upon an arrest of judgment the court is to adjudge to the party against

whom such judgment is given the costs occasioned by the trial of any issues of fact arising out of the pleading, for defect of which judgment is given, upon which such party shall have succeeded. It has been decided that if judgment is arrested, the plaintiff is entitled to the costs of issues found in his favour, under the 145th section of the C. L. P. Act, 1852, and the general rule is not affected by an agreement that certain items of the costs are to abide the event. *Whaley v. Laing*, 8 Week. Rep. 439.

**EXECUTION.**—*Expenses of fi. fa. returned nulla bona, and ca. sa. issued thereupon.*—The following is a decision of practical importance, and in our opinion, if the contrary had been decided it would have been quite consistent with the statute, and more consonant with justice. The C. L. P. Act, 1852, s. 123, enacts, that “in every case of execution the party entitled to execution may levy the poundage fees and expenses of the execution over and above the sum recovered.” The plaintiff having issued a writ of fi. fa., to which a return of nulla bona had been made, issued a writ of ca. sa., and indorsed upon it the expense of the abortive writ of fi. fa.: Held, that under the above section he was not entitled to levy more than the expenses of the writ of ca. sa. *Salisbury v. Wray*, 2 Law Tim. Rep. N. S. 286.

**SECURITY FOR COSTS.**—*Irishman serving with his regiment in Ireland.*—Although it is a clearly established rule that a soldier or sailor on foreign service cannot be required to give security for costs, this is confined to one having an English domicile, and it has therefore been decided that an Irishman, plaintiff in an action, serving with his regiment in Ireland, and having no domicile or property here, will be required by the court to give security for costs. *Chappel v. Watt*, 2 Law Tim. Rep. N. S. 283.

#### CRIMINAL LAW.

**CERTIORARI.**—*Removal of indictment—Costs—Prosecution instituted by town council.*—The 16 & 17 V. c. 30, requires the recognisance on the removal of an indictment by certiorari to contain a provision that the defendant in case of conviction shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment. Under the 5 W. & M. c. 11, s. 3, the prosecutor must be some “person aggrieved.” In the following case a prosecution was directed to be instituted by the town council of a municipal borough, and two members of the council instructed the attorney who conducted it, and rendered themselves liable for the costs to him. The defendant removed the indictment by certiorari, entering into the usual recognisance: Held, that the two councillors were entitled, by the 5 W. & M. c. 11, to costs from the defendant on conviction. *Reg. v. Fox*, 2 Law Tim. Rep. N. S. 211.

**POOR RATE.**—*Distress warrant—Discretion of justices—Rateable occupation.*—In the following case a distinction was made of some practical importance as to the discretion of justices to grant or refuse a warrant to enforce payment of poor rates. If a party be in the actual occupation of

property for which he is rated and he refuse to pay the rates, the magistrates are bound to issue a warrant to levy the amount of the rate whether the occupation be beneficial or no; that being a question proper to be raised on appeal against the rate, but not on the application for a warrant. But as the parish officers have no power to rate any but occupiers, if the party rated has no property within the parish, or having property there does not occupy it, he may show that as ground against a distress warrant being issued. *Reg. v. Bradshaw and another, Justices of Warwickshire and Newcastle*, 8 W. Rep. Ch. 435.

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## Notices of New Books.

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*The Law Magazine and Law Review, or Quarterly Journal of Jurisprudence: for May, 1860. Being No. XVII. of the New Series. London: Butterworths.*

The above, or at least one moiety of it, is the oldest law publication in existence, and on that account alone has some claim to attention. The changes which have taken place since its first appearance have almost entirely altered the aspect of the profession, and it is therefore not very wonderful to find that the publication itself has been affected thereby. In some respects the profession is not what it was, whether the bar or the solicitors be considered, and the changes have not been altogether in such a direction as could be desired. There seems, at least, to be less of the brilliancy—the gilt, if you will—than formerly attended the profession, though, doubtless, there are now more real business-men attached to it, and the numbers being greatly increased there is a worldly-mindedness attendant upon it which seemed hardly to be felt in former times. The olden lawyers had more literary tastes than the present race, and that explains the former palmy state of the *Law Magazine* in contrast with its present condition. Nothing is now cared for but practical matter, and hence the existence of the *Jurist*, *Law Times*, *Solicitors' Journal*, &c., which minister, or are supposed so to do, to the increase of fees. This is a condition of things much to be deplored, but as utility is more the idol of every man, we suppose it must be endured. But to return to the *Law Magazine*, we find the present number has about sixteen articles on—1, the Lunacy Law and its Defects; 2, the Inns of Court; 3, the Consolidated Chancery Orders; 4, the French Bar; 5, Hilliard's Law of Torts; 6, Conveyancing in Australia; 7, Corrupt Practices at Election; 8, the Joint Stock Acts; 9, Law and Lawyers in the Colonies; 10, The Bankruptcy Bill; 11, Notice of John Austin; 12, Judges' Chambers; 13, Arbitrations;

14, Points recently decided under Lord St. Leonards' Act; 15, Notices of New Books; 16, Events of the Quarter.

The above statement will, in some degree, enable those who are not acquainted with the periodical to judge of its general character, and must suffice as it is not our intention to become the critic of so old a publication. From the article on "Law and Lawyers in the Colonies" we take the following, as being very suitable to the above remarks:—

"A London lawyer, when he hears of "the legal profession," has brought before his mental vision so much of the world of lawyers as is described in a considerable portion of a neat red book, which, published annually by that respectable firm Stevens and Norton, calls itself "The Law List;" for the significance of terms depends upon the limits and exactitude of a man's knowledge, and by far the greater number of barristers and solicitors in England have rarely anything to do with either their foreign or colonial brethren. In this busy bustling world, the inhabitants, both of the old country and the younger one, find it essential to concentrate their attention on their own affairs; and, having no direct occasion to meditate upon systems and practices foreign to their own, they do not make the opportunity.

Of course there are exceptions to this exclusive attention of lawyers to their own local interests and pursuits; but, owing to the incurious character, the speculative inactivity, and the narrowed and practical quality of the national mind, we certainly maintain an extensive ignorance of the law and lawyers of those mighty colonial provinces, which either have created their own systems of jurisprudence, or exercise their jurisdiction under the authority of the British crown.

It would, indeed, form a somewhat heterogeneous body of law, if all the colonial procedures and statutory enactments were collected. But we believe we may safely affirm that there are, in the administration of the law throughout our colonies, two general distinguishing characteristics; the one the unimpeachable integrity of the bench, and the other the independence of the advocates. Wherever the English people have emigrated, they have carried with them an invincible love of judicial impartiality. No name in the annals of English history is so hated as that of Jefferies. A venal, corrupt, or partial judge, who is open to suggestions off the bench, or who exhibits partisanship or courtier-like subserviency on it, is certainly the most detested character among us. We believe the impress of integrity has been stamped universally on the character of our judicial officers; nor can there be any doubt that this is of more importance than the possession of the most perfect code, or a staff of the most perfectly taught lawyers in the world. In some civilised countries the private suitor has no chance against the government; while in others the characters of judge and prosecutor are combined in one person; and we read occasionally of the court of justice being transformed into a scene at a theatre, where the judge is only one of the *corps dramatique*.

When, however, there is a free exercise of the profession of the advo-

cate, whether he unites the characters of barrister and solicitor, or they remain distinct, the effect mutually on judge and advocate is necessarily favourable to the administration of justice; and it is this exercise of the profession of the law in open court which is the great safeguard for the community. The mere forms of court practice are of little worth in comparison with the open administration of justice, with the aid of independent advocates, in the presence of the public. In the backwoods or young settlements the forms may be rude; but if tradition has maintained the spirit of the English administration of the law in this respect, the essential part of its character will have been preserved.

The etiquette of the profession, as well as the forms of justice, depends upon the *accidents* of society where its members flourish. Modern refinement, for example, in relation to *honoraria*, in which the fiction is affected to be believed, that counsel are not paid as an apothecary or turnpike-man, and where a mysterious silence pervades the whole money part of the transaction, does not hold in new and old world settlements. A good fellow who kept terms with us migrated to a young colony which shall here be nameless, and there alternately pursued his profession and the beasts of the field and wood; but he felt some difficulty in getting such indorsements on his brief as would be acceptable in the Temple. The doctrine that "the fee should always be put outside," was indeed strictly enforceable in many cases with him; for the hides and horns, &c. (which represented in his case the "guas"), were, *odoris causâ*, necessarily left external to his hut. Although here all forms of *honoraria*, and often in kind, were tendered, and obliged to be accepted, our friend was never the worse lawyer, or less respectable as an advocate. Happy would it be for the legal professors in the "old country" if clients always paid as regularly, and barristers always dealt as honourably, as our successful, skilful, and learned colonial friend, whose fee-book would be a curiosity of the greatest magnitude in Lincoln's-inn.

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## Moot Points.

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### No. 39.—*Succession Duty Act—Determined Annuity.*

A., by deed, dated August, 1853, granted to B. an annuity of £100, and charged same on a certain estate. A. afterwards sold the estate to C., who again sold to D. The annuitant, B., has recently died, but A., the grantor of the annuity, is still living. Is D. liable to be charged with succession duty in respect of the determined annuity under ss. 5 and 6 of the Succession of the Duty Act?

J. M. KING.

No. 40.—*Lessor and Lessee—Use and Conversion—Using Ground as Race-Course, &c.—Penalty.*

A. demises land to B. on lease for twenty-one years, it being thereby mutually agreed that for every acre of pasture land which B. should "dig, break up, plough, use or convert into tillage, or for any other purpose whatsoever," he, B., should pay an additional rent of £80 per acre. Suppose B. to use the ground as race-course, and ground for training horses, would this be a breach of the covenant, and, therefore, entitle A. to the additional rent?

JOHN W. S. LAVENDER.

No. 41.—*Commissioner in Bankruptcy purchasing from Assignees.*

A solicitor may, subject to certain conditions, purchase from his client. Query: can a commissioner in bankruptcy purchase from the assignees? If not, what is the reason for the distinction between a purchase by a solicitor from his client, and a purchase by a commissioner in bankruptcy from the assignees?

JOHN W. S. LAVENDER.

No. 42.—*Refusing to perform Marriage Ceremony, or to administer Sacrament.*

Will an action at law lie against a parson for refusing to perform the marriage ceremony, or for refusing to administer the Sacrament of the Lord's Supper?

JOHN W. S. LAVENDER.

No. 43.—*Pledging Watch—Loss of Ticket—Wrongful description of Deponent—Pawnor's Remedy, &c.*

A., of London, pledged his watch with B., a licensed pawnbroker, giving his name and abode, at the time of pledging, as "J. Smith, Birmingham." A. has since lost the ticket, and B., consequently, refuses to give up the watch without the production of the ticket. A. can, of course, recover the watch by making an affidavit of the loss of the ticket; but—*quære*—suppose A. to make the affidavit in the name of Smith (not disclosing his *real* name), does he thereby subject himself, in any way, to punishment? and does the description of the deponent in an ordinary affidavit (the part *preceding* the words "maketh oath and saith") form part of what he swears to?

JOHN W. S. LAVENDER.

No. 44.—*Heir-at-Law.*

A. was eldest brother and heir-at-law to an estate in England, and emigrated to North America in the year 1819; was married there shortly afterwards, and died in 1859, leaving male issue him surviving. Does his eldest son (born and brought up in America, and never was in England) heir the property, or is the same vested in A.'s eldest brother in England.

E. M.



## Answers to moot Points.

### No. 29.—*Limitation to Bar Dower* (*ante*, p. 110).

I am of opinion that the dower of B.'s wife is effectually barred; but inasmuch as there is no power of appointment, I think that the purchaser would (on the authority of *Collard v. Roe*, 31 L. T. Rep. 148) be entitled to call for C.'s concurrence in the conveyance. S. J. E.

### No. 32.—*Contract—Taking Possession* (*ante*, p. 111).

I think the purchaser is not prejudiced by taking possession *with the vendor's consent*, particularly as he did not know that a satisfactory declaration could not be obtained, but, on the contrary, had good reason to presume it could.

If the purchaser has altered the state of the property, however, he may be bound to take it (see *Dart's Vendors*, 288). S. J. E.

### No. 38.—*Sale by Two of Three Trustees* (*ante*, p. 115).

The trustees, A., B., and C., were joint tenants of the property, and the sale by A. and B. operated as a severance of the joint tenancy, and the fee as to A.'s third on his death vested in his heir-at-law or devisee of trust estates. The fee as to the remaining two-thirds passed to the purchaser on the sale by B. and C. (see *Watkin's Prin. Convey.*, 9th ed., p. 166, 167, and the cases there referred to. J. M. KING.

## Articled Clerks.

**POOR LAW.**—*Settlement by apprenticeship—Articled clerk*—3 W. & M. c. 11, s. 8.—An articled clerk to an attorney or solicitor is an apprentice within the meaning of sec. 8 of the 3 W. & M. c. 8, so as to gain a settlement by inhabiting a town or parish. *St. Pancras v. Clapham*, 8 Week. Rep. 493.

**ASSIGNMENT OF ARTICLES.**—*Enrolment of assignment—Affidavit*—6 & 7 V. c. 73, ss. 8, 9—7 & 8 V. c. 86, s. 2.—A. was articled to an attorney and served two years, when he was assigned over to his own father, an attorney. A.'s father's memory became impaired, and he died within six months of the assignment, never having made the affidavit required by the 6 & 7 V. c. 73, s. 8. The court permitted the assignment to be enrolled upon satisfactory evidence being given of the facts which should have been contained in the affidavit. *Exp. Lee*, 8 Week. Rep. 541.

## Summary of Decisions.

### EQUITY AND CONVEYANCING.

**ACCOUNT, BILL FOR.**—*Common Law Procedure Act—Injunction—Reference to arbitration—Accounts.*—Where it was manifest that the attempt of a trial at law would be a reference to an arbitrator to take complicated accounts even before or since the Common Law Procedure Act, such accounts could not be taken so conveniently as in a court of equity. Where there are complicated questions of account, in which difficulties will apparently arise in the taking of them, the Court of Chancery will still grant an injunction to stay proceedings at law. *Oakford v. European, &c., Co.*, 2 Law Tim. Rep. N.S. 566.

**CHARITY.**—*Condition—Forfeiture—Cypres—Scheme for administration of charity.*—The will of a testator devising lands to a charity contained a condition that, if the vicar of L. (the recipient of the charity), for the time being, should neglect to read divine service as prescribed by the will, then it should be lawful for the trustee of the charity to pay the profits of the land to the master of the free school of W. The vicar of L. could not obtain a congregation to meet on the days and times specified by the will; but he was willing to have read the service, and professed his willingness to have done so by summoning a congregation, by tolling of the bell, and otherwise: Held, that a forfeiture did not accrue in consequence of this neglect, it not being a wilful neglect, and that, as vicar of L., the provision made by the will for the poor vicars of L. had not been forfeited. The court directed a scheme as to the intention of the testator for combining religious instruction and worship. *Re Connington's Will*, 2 Law Tim. Rep. N. S. 585.

**EQUITABLE MORTGAGE.**—*Sale—Costs—Priority of.*—An equitable mortgagee, who is such by a deposit of title-deeds, without an accompanying written memorandum of such deposit, is entitled to his principal, interest, and costs on realising the security; his costs to be in priority of those of the administrators of the deceased mortgagor's estate. *Tuckley v. Thompson*, 2 Law Tim. Rep. N. S. 565.

**LEGACY.**—*Bequest—Life estate—Next of kin—Widow of testator not his next of kin.*—Where there is a bequest in trust for A. for life, and from and after his death in trust for the testator's next of kin, A. being himself the next of kin, or one of the next of kin, there is no reason for holding that A. is precluded by the gift to him of the life estate from taking under the gift to the next of kin, nor for holding that the next of kin who are to take are those who may be such at the death of A. A gift by a testator to his next of kin does not include his widow. *Lee v. Lee*, 2 Law Tim. Rep. N.S. 532.

**MORTGAGE.**—*Devise of real estate subject to mortgage—Direction that debts should be paid by testator's executors—Mr. Locke King's Act—What will amount to an expression of a contrary intention.*—A testator by will, dated since the 31st Dec., 1854, directed that his just debts should be paid by his

executors out of his estate. He then bequeathed his personalty to A., whom he also made one of his executors, and devised real estate, subject to a mortgage-debt to B. By the 17 & 18 V. c. 113, it is enacted that when a person shall die seised of an estate charged with the payment of any sum by way of mortgage, and shall not have signified any contrary or other intention, the devisee shall not be entitled to have the mortgage debt paid out of the personal estate: Held, that the direction that the debt should be paid by testator's executors (of whom the devisee of the personalty was one), was a sufficient indication of an intention that it should be paid in a way different from that pointed out by the act; consequently that the provisions of the statute did not apply, and that the ordinary rule must prevail, and the debt be paid out of the personal estate. *Woolstencroft v. Woolstencroft*, 2 Law Tim. Rep. N. S. 526.

**MORTGAGE.**—*Payment out of personalty*—17 & 18 V. c. 113—*Copyholds*—*Exoneration*.—The act 17 & 18 V. c. 113, for rendering mortgaged estates primarily liable for payment of the mortgage debt in exoneration of the personal and other estates of the deceased mortgagor, includes copyholds. A. purchased copyholds in 1852, to be surrendered to the use of him, his heirs and assigns. In the same year he mortgaged the copyholds, with a proviso that on repayment of the money the surrender (thereby covenanted to be made to the use of the mortgagee) should enure to the use of A., his heirs, and assigns. A. died intestate in 1858, and the mortgage money was paid off by his administrator: Held, that the infant customary heir was not entitled to have the mortgage debt paid out of the personal estate of the intestate in exoneration of the copyholds, and that the case did not fall within the saving proviso at the end of the 17 & 18 V. c. 113. *Piper v. Piper*, 8 Week. Rep. 541.

**MORTGAGE.**—*Tacking*—*Appropriation of payments*—*Negligence*—*Constructive notice*.—The following case presents points in the law of mortgages relative to—1, negligence of the mortgagee in not asking for the title deeds; 2, as to appropriation of payments on account made by the mortgagor after parting with his equity of redemption; 3, as to tacking by obtaining the legal estate. It appeared that P., the lessee of certain premises, mortgaged them to H. for the whole term, wanting one day. He remained in possession, and some time after the mortgage agreed to sell the whole term to B., and delivered copies of his title deeds promising to furnish the originals as soon as one should be re-executed. B. allowed a considerable time to elapse, and paid great part of the purchase-money without requiring the original deeds, but subsequently, before completion, he learnt that P. had deposited them with H., and had also, before the agreement for sale, deposited with A. two worthless deeds purporting to be the original deeds by way of securing a running account. After notice of the agreement A. took an assignment of P.'s property, including the leasehold. B. bought in H.'s mortgage: Held, that B. was entitled to tack the sum he had paid for purchase-money to the mortgage debt, and also to hold the property as security for sums laid out by him on improvements; that B. was not guilty of such gross negligence as to fix him with notice of all he might have learnt by inquiry; that on A.'s receiving notice that P. had parted with his right

to redeem he was no longer bound to appropriate payments by P. to the extinction of the debt secured by the deposit of deeds. *Hipkins v. Amery*, 8 Week. Rep. 360.

**PUBLIC COMPANY.**—*Winding-up Act*—21 & 22 Vict. c. 60, s. 19—*Compromise upon grounds concealed from creditors—Discretion of Court—Costs.*—In a compulsory winding-up the official liquidators agree with certain shareholders in the mass to compromise their liabilities for a fixed sum, such compromise being founded on details of property and circumstances which, if divulged, would act most detrimentally, both as regards such shareholders and the general winding-up, and the official liquidators ask the court under the 19th sect. of the 21 & 22 V. c. 60, to sanction such compromise without the data upon which it is found being divulged, and that application is supported by the mass of creditors but opposed by others. Application refused with costs. It is not imperative under the 19th sect. of the 21 & 22 V. c. 60, to give notice to creditors, but entirely in the discretion of the court. *Ex parte Totty*, 8 Week. Rep. 624.

**SOLICITOR.**—*Executor—Claim for "professional services."*—The following is extremely important to solicitors who undertake executorships and trusteeships, in regard to their remuneration for business transacted by them in the trust:—A solicitor, who is appointed executor, and is by the will authorised to charge for his "professional services," can only charge for services which are strictly professional, and not for business done, which an executor in his ordinary character can and ought to do, such as attendance to transfer stock, make payments, correspondence, &c. Very extensive words are required to enable a solicitor to charge for such matters. *Harbin v. Darby*, 2 Law Tim. Rep. N. S. 531.

**SOLICITOR AND CLIENT.**—*Undue Influence—Annuity Deed.*—In money transactions between a solicitor and his client, the solicitor must advise his client as he would have done if the client had been dealing with a third party. Where, therefore, a solicitor had advanced money to his client on the assignment of an annuity under a will, and the full particulars of the security was at the time explained to the client by the solicitor's clerk, and although the client swore that she was wholly ignorant of the nature of the security given, thinking it was a simple mortgage deed: Held, that the transaction was such a one as would be upheld by a court of equity. *Edwards v. Williams*, 2 Law Tim. Rep. 421.

**TRUSTEES.**—*Bankruptcy—The Bankrupt Law Consolidation Act, 1849, s. 130—Vexatious conduct—Irrelevant matter—Removal of trustee refused.*—The powers conferred upon the Court of Chancery for the removal of bankrupt trustees are not imperative, but discretionary. Bankruptcy of a trustee is good ground for his removal, if the bankruptcy in the smallest degree endangers the trust-property in his hands, but the mere fact of a trustee having, at some time or other during his trusteeship, been a bankrupt, is not in itself a ground for his removal. Upon a petition under the Bankruptcy Act to remove a trustee on the ground of his bankruptcy it is irrelevant to charge him at the same time with vexatious conduct. *Re Bridgman's Trust*, 2 Law Tim. Rep. N. S. 560.

## EQUITY PRACTICE.

**PAYMENT OUT OF COURT.**—*Disentailing deed dispensed with.*—A share of the purchase-money of an entailed estate, taken by a railway company, paid out to the husband of a married woman, upon her consent; without a disentailing deed as to the particular share being required. *Re Tyler*, 8 Week. Rep. 540.

**SUBSTITUTED SERVICE.**—*Decree directing Payment of Money—Defendant abroad on her Majesty's Service.*—The court will order substituted service of a decree which directs payment of money by a defendant who is stationed abroad on her Majesty's service, without evidence of any attempt to serve him personally. *Griffiths v. Cowper*, 8 Week. Rep. 539.

**SETTLED ESTATES ACT.**—19 & 20 V. 120, s. 2—*Gen. Ord. xli. 20—Setting petition down for hearing—Presenting petition after advertisement.*—A petition under 19 & 20 V. c. 120 cannot be set down for hearing until the Lord Chancellor's secretary has certified that the advertisements have been duly inserted, and that the twenty-onedays required by Gen. Ord. xli. 20 have expired since the last advertisement. *Re Blake*, 8 Week. Rep. 539.

## COMMON LAW.

**ATTORNEY AND CLIENT.**—*Striking Attorney off the Rolls—Fraud.*—Where an attorney has committed a fraud, although it may not be such a fraud as makes him amenable to the criminal law, and, although, the transaction is not strictly one between the attorney and a client, the court will interfere, either by suspending his certificate, or striking him off the rolls, according to the gravity of the offence. *Re Blake*, 2 Law Tim. Rep. 429.

**BUILDING CONTRACT.**—*Extras—Operation of new contract as waiver of stipulation as to time in the original—Pleadings—Equitable replication—Contract in writing.*—The following case shows the difficulties which arise out of extras being ordered where there is a building contract containing a stipulation as to the time of completion, with penalties for neglect. Where to an action for work, labour and materials, to be done on certain houses, &c., of the defendant a plea claims a right to deduct a sum as and for a penalty of £1 per house for each week, that the whole were behind the 20th March (as in the agreement) and the plaintiff replies, that before that day and before breach it was further agreed that some additional works should be done on the houses, &c., by the plaintiffs, and that the whole should be finished in a reasonable time, and states that the new works became and were so inextricably mixed up with the old, that it was not possible, &c., to get the whole finished by the 20th March, but they were completed in a reasonable time, and that all this was always known to both parties: Held, a good answer at common law to the plea as showing a waiver by the defendant of the stipulation as to time. *Thornhill and another v. Neats*, 2 Law Tim. Rep. N. S. 539.

**CHAMPERTY AND MAINTENANCE.**—*Assignment to cestui que trust—Contract to lend money—Reasonable time.*—To constitute champerty or maintenance, there must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a

legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary. An assignment by a trustee to a cestui que trust or to the party really interested to enable him to sue, is not void for maintenance or champerty. A. agreed with B. that A. would get money from F. who was out of town, to lend B. to pay B.'s pressing debts, in consideration of which, B. agreed to grant a lease of his lands as security, expecting to get the money in seven or eight days, the probable time of F.'s return. The money was not got till nineteen days, B. having been obliged to borrow money elsewhere, in the meantime: Held, the delay of nineteen days was unreasonable, and B. was not bound by the agreement. *Fischer v. Nuicker*, 2 Law Tim. Rep. N. S. 94.

COMMON.—*For three-fourth parts of a cow, and one other cow.*—Defendant claimed as occupier of certain land a right to have common of pasture for one cow and three-fourths of a right of common for one other cow, and alleged that another person had one-fourth part of a similar right of common for a cow in the same field, and that the defendant in respect of his right for one and three-fourth parts of another, and as the servant of that other person in respect of his one-fourth part, put into the said common field two cows: Held, that such a plea was unintelligible. *Quéry*, whether if there were any clear and express grant of a right of common to a fractional part of a cow, and the same person in respect of a certain tenancy in gross had a right of common to the extent of one part, and could find another person in a similar situation, and entitled to the other part, he might couple the two together. *Nicholls and another v. Chapman*, 2 Law Tim. Rep. N. S. 568.

EVIDENCE.—*Deed thirty years old—Custody.*—A deed thirty years old, a link in the chain of the defendant's title to the property, to recover possession of which the action was brought, was produced by a witness who received it from the defendant's attorney: Held, on the authority of *Doe v. Phillips* (8 Q. B. 158), that there was sufficient evidence of proper custody. *Johnson v. Tyrrell*, 2 Law Tim. Rep. N. S. 429.

MONEY HAD AND RECEIVED.—*Money paid under a mistake of facts.*—Notwithstanding earlier cases to the contrary, it is now settled that money paid under a mistake of facts arising from an error in taking accounts may be recovered back in an action for money had and received, although the plaintiff had been guilty of laches in making the miscalculation. *Townsend v. Crowdy*, 2 Law Tim. Rep. N. S. 537.

PRINCIPAL AND SURETY.—*Joint promissory note—Discharge of surety by creditor giving time to principal—Doctrine of equity.*—The following is a most important decision of the Exchequer Chamber as to suretyship in cases of joint bills or note. To an action against the defendant as the maker of a promissory note, the defendant pleaded by way of equitable defence, that the note was the joint and several note of defendant and T., and made by defendant as security only for T., and that plaintiff had notice of the promises; that plaintiff gave time to T. without defendant's consent. The jury found that defendant was security for T., and the plaintiff knew that fact,

but that he did not agree, nor did defendant stipulate that he should be considered or treated by plaintiff as security or otherwise, than as a maker: Held (affirming the judgment of the Court of Q. B.), that an equity arises from the relation of principal and surety, and the knowledge of that fact by the creditor; so that if he gives time to the principal debtor without the consent of the surety, the latter is entitled to be relieved from his obligation: Held, also, that it is immaterial that there was no stipulation at the time of the making and delivering of the security; that the party (who is de facto a surety) is to be treated as a surety only. *Pooley v. Harradine* (7 E. & B. 431); affirmed, *Greenough v. McClelland*, 2 Law Tim. Rep. N. S. 571.

**PROBATE DUTY.**—55 G. 3, c. 148—*Probate duty—Estate and effects—Equitable conversion.*—As mortgage-money recovered by an executor by the aid of a court of equity is assets and liable to probate duty, so is purchase-money recoverable in the same manner. A testator having by a binding contract entered into a contract to sell a freehold estate and received a deposit, after his death it was decreed to be specifically performed, when his executor received the remainder of the purchase-money: Held, reversing the decision of the Court of Exchequer, that probate duty was payable in respect of the purchase-money received by the executor as part of the personal estate of the testator. All money received by the executor by virtue of probate is subject to probate duty. *The Attorney-General v. Brunning*, 8 Week. Rep. 362.

**TROVER.**—*Damages—Sale—Re-sale by vendor.*—Where sheep were sold but not delivered, and before the price had been paid, the credit not having expired, were re-sold by the vendor to a third person: Held that trover would lie, but that the measure of damages ought not to be the price of the sheep, but the damage actually suffered. *Chimery v. Viall*, 8 Week Rep. 629.

#### COMMON LAW PRACTICE.

**COSTS.**—*Taxation—Allowance for witnesses—Expenses not paid—False affidavit of increase—Review of taxation.*—An attorney told his client before action that the costs of witnesses must be paid previous to taxation, and gave him a list containing the names of his witnesses, and the amount of their expenses. The client afterwards gave him receipts of the different witnesses for such sums. The attorney, in the affidavit of increase, swore that he had caused the witnesses to be paid. The master allowed the expenses upon taxation. It was afterwards discovered that the witnesses had not been paid until after taxation. The court directed the master to review the taxation, and to disallow all such expenses as had not been actually paid at the time of the previous taxation. *Cross v. Durrell*, 8 Week. Rep. 630.

**GARNISHMENT.**—*Common Law Procedure (Amendment) Act, 1856, s. 63—Garnishee order—Proceeds of sale of an officer's commission in the hands of an army agent.*—The proceeds of the sale of the commission of an officer in the army are liable, while in the hands of army agents to whom

they have been transferred by the Horse Guards, to be attached by an order under the garnishee sections of the C. L. P. Amendment Act (Ireland), 1856. *Power v. Kenny*, 2 Law Tim. Rep. N. S. 93.

## BANKRUPTCY.

**CONTRACT.**—*Not executed before act of Bankruptcy.*—A contract entered into by S., with a trader two months before his bankruptcy, to pay a composition to his creditors, on having the advances secured by an assignment of the trader's property, but not executed by the latter until the day before he was adjudicated bankrupt, and full six weeks after he had committed the act of bankruptcy upon which the adjudicated proceeded, is not such a contract as the court will recognise as against creditors, although the majority of the creditors had agreed to accept, and some of them had received the full amount of the composition. *Sewell v. Symons*, 2 Law Tim. Rep. N. S. 576.

## PROBATE AND DIVORCE.

**ADMINISTRATION.**—*Paper not testamentary on the face of it—Evidence of testamentary intention.*—B. having been informed that he could not recover from the illness he then laboured under, expressed a wish that his wife should be in a position to receive at his death certain sums of money in savings' banks, and signed, in the presence of witnesses, two orders on a savings' bank to pay to his wife, at any time she might apply for the same, any money. B. died on the following day. The court granted administration, with the two orders as together containing the will of B. annexed, to his widow. *Re Marsden*, 2 Law Tim. Rep. N. S. 87.

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## Moot Points.

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### No. 45.—*Bankruptcy—Petitioning Creditor—Execution.*

A., being a trader within the meaning of the Bankruptcy Laws, executes an assignment for the benefit of his creditors. B., one of his creditors, will not execute it, but puts A. in prison. Afterwards B. wishes to file a petition in bankruptcy against him, can he do so? Or is A.'s imprisonment a satisfaction of the debt? and has the imprisonment any effect on the deed of assignment?

### No. 46.—*Legacy Duty.*

A testator gives a legacy of £1,000 to A.B., husband of a daughter. What legacy duty is payable? The daughter, if legatee would only pay one per cent.; the husband is a stranger in blood to the testator. **LEX.**



*No. 47.—Mortgage—Power of Executor to advance Money to Mortgagor to pay off mortgage to himself and co-Executor.*

One of two executors who had given notice to a mortgagor to pay off a sum of money due to the estate of their testator on mortgage of copyhold property, is desirous of advancing, out of his own moneys, to the mortgagor, a sum sufficient to enable him to comply with the notice, upon the security of a transfer of the mortgage. Is the executor disqualified from making the advance by reason of his fiduciary character in respect of the debt and mortgaged hereditaments? The transfer would in this case be affected simply by the present conditional surrender being vacated by the acknowledgment of satisfaction of the executor, and a new conditional surrender immediately afterwards passed by the mortgagor to the use of the executor proposing to make the advance. JOHN W. S. LAVENDER.

*No. 48.—Repairs.*

A. has a lease from B. (B. having a lease from C.) of certain stables, coach house, and premises. A.'s lease does not contain any covenant for repair of premises. The entire front of the coach house falls in, and the premises require new roofing. Some time since, part of a wall fell down, and A. rebuilt it. Now, I wish to know if B. ought not to have done, and to do all these repairs which go under the head of "substantial and lasting." This B.'s representative (B. having died soon after lease was executed) refuses to do. I also wish to know A.'s remedy. B. H. C.

*No. 49.—Power of sale to Executors.*

A. by will devised certain properties (subject to a mortgage) to trustees for the term of a year upon trust to receive the rents and apply the same as in his will mentioned, and then he directed that his executors should stand possessed of all his real estate, and also all his personal estate upon trust thereout to pay his debts (except the mortgage debt). And he thereby expressly authorised and empowered his said trustees and did direct them in the spring time of the year, which should next follow the expiration of twelve calendar months after his decease, to make sale and absolutely dispose of all his real estate. And he did thereby will and order that such sale should be by public auction or private contract, and subject to conditions in ordinary form, and upon sale he directed his trustees to convey and assure the same, and to give receipts, and the proceeds of the sale he directed to be applied as therein mentioned. Upon a sale in due course, would a conveyance by the trustees and the mortgagee be sufficient to oust the estate of the heir at law, and vest the absolute legal estate in the purchaser? the trustees having simply a power.

## Notices of New Books.

*The Law Magazine and Law Review; or, Quarterly Journal of Jurisprudence,*  
for August, 1860. No. XVIII. of the New Series. London:  
Butterworths.

We some time since noticed the May number of the above publication, and we have now before us the August number, which contains many articles of interest, among which may be specified the following: I. Arrest of the Five Members (being a notice of Mr. Forster's Work); II. Maritime Law: Master and Owner; III. The Civilians of Doctors' Commons; IV. The Regulations affecting Commission Agents; V. Causes Célèbres—The Watchman of Eldagsen; VI. Reporters and Reporting; VII. Law and Equity Bill; VIII. Law Amendment Society's Papers, &c. The first article is an able paper in refutation of Mr. Forster's work, or rather the conclusion of that learned writer, and we commend it to the reader's attention. We present an extract from this article, which will probably induce some to procure the work in order to read the whole article:—

“Two hundred years have just elapsed since the Long Parliament, terminating an existence of twenty years, dissolved itself under universal contempt, and the opprobrious name of the Rump, by the coercion of General Monk, and since the restoration of Charles II., on the 29th May, 1660, re-established the Constitution by king, lords, and commons. The great party in the nation, which took their revenge on the Long Parliament by raising Charles I. to the rank of a martyr,—and which has annually, for nearly two centuries, ‘by prayer and fasting,’ implored the mercy of God, ‘that the nation and its king might not again be delivered up into the hands of cruel and unreasonable men,’ and ‘with prayer and thanksgiving’ thanked Almighty God ‘for having put an end to the Great Rebellion, and for the restoration of the Government,’—at length became convinced (to use the words of the highest ecclesiastical authority) that ‘it was impossible, even if it were desirable, that we should entertain the feelings, and sympathise with the expressions contained in these state-services;’ and in the session of 1858 both Houses of Parliament, by unanimous addresses, prayed the Queen that those services should not only be discontinued, but should not be again printed and published in the common prayer book. It might have been expected that the party feelings which these state-services strove to perpetuate would now disappear, and that the facts and circumstances which were their origin would fall peaceably into the domain of impartial history. But whilst this graceful act of oblivion is performed by a great and triumphant party, there has arisen a champion of the Long Parliament, who, impressed by the study of its proceedings and its heroes,

for which he is eminent, discards all moderate and conciliatory views, and seeks to awaken in modern breasts the contemptuous and disdainful feelings against Charles I., by which that famous parliament was animated, to represent its proceedings as not only just but necessary, and to brand the king and his supporters with folly and infamy.

"We refer to the recent work of Mr. John Forster, 'on the arrest of the five members by Charles I.' which is announced as a chapter of history re-written; and its purpose to correct, by a true history, elicited from trustworthy and as yet unpublished contemporary records, Lord Clarendon's most elaborate, ingenious, and studied misrepresentation. A work which proposes to change the face of history, to overflow in effect not only the perhaps too partial conclusions of Clarendon and Hume, but the calm and philosophic judgments of Hallam, is a challenge to all comers; and we deem it within our province to consider Mr. Forster's new authorities, and his arguments, and the conclusions at which he has arrived. We shall probably uphold the views of our former guides, whilst we give to our readers our own on this interesting epoch of history; but for that purpose we must introduce materials not found in Mr. Forster's book, which, whilst claiming to present new historical facts, is defective in the statement of the old. It is to point out his omissions, and to guard against conclusions derived from defective premises, that we address our readers. We shall, no more than Mr. Forster—and perhaps even less than he—uphold principles at variance with genuine liberty; but we shall make the constitution our guiding star, and, when we make any decisions, we shall endeavour to found them on principles of justice and on historic truth.

"We shall begin by considering the nature of the unpublished 'contemporary records' which have been brought forward by Mr. Forster's diligence. They are not records, in the ordinary sense of public documents—state, parliamentary, or legal; they consist of private letters found, with one important exception, in the State Paper Office; and, besides these, he has made use of an unpublished journal of Sir Simonds D'Ewes, a member and partisan of the Long Parliament, part of the Harleian MSS. The letters, existing still in manuscript, our author tells us, have not been before used in any of the histories. We shall find that he is mistaken in that assertion as to two of the letters; and therefore it may be inferred that the others in the State Paper Office have been inspected and weighed, as elements of history, by at least one previous historian. The value of private letters as elements of history is not, however, very considerable, where the chief facts are preserved in public records; nor can they safely be depended upon for facts not before known, unless considered as representations of the desires, prejudices, and feelings of the writers, and of the parties to which they were attached. The letters now introduced, written by persons of opposite sides in the great struggle to which they relate, frequently conflict; but they do not contradict—indeed, they generally confirm—the historic facts derivable from evidence of a higher nature; and thus the leading public events of this passage of history remain on their ancient basis.

"We are not disposed to underrate the services of the Long Parliament. We acknowledge the public spirit, energy, and determination of its leading members; and we adopt Mr. Hallam's opinion, that 'by their salutary restrictions and new retrenchments of pernicious or absurd prerogative, the Long Parliament formed our constitution such nearly as it now exists.' Hume, also, has the candour to admit—indeed, no one can reasonably deny—its eminent services, 'during the *first* period of its operation, when their merits so much outweigh their mistakes as to entitle them to praise from all lovers of liberty.' But we do not believe in any theories of history based on angelic virtue in one party, and unmitigated wickedness in the other; which, we think, we do no injustice to our author in stating to be the theory of his book. It is at that part of the career of the Long Parliament which our author takes up, that we think its proceedings became questionable. It had achieved a great victory over the king, both by the enactment of important laws curtailing his prerogative, and by the execution, banishment, or imprisonment of his most eminent ministers and adherents. The spirit of Charles was humbled, and his high notions of prerogative reduced. His speeches to parliament evince that change. But neither that change, nor the important circumstances which produced it, are adverted to by our author. He would, we think, have assisted his readers, and perhaps tempered his own judgment, in estimating the value of his new authorities, and of his arguments and conclusions, if he had commenced his history with some account of the political position of the two great parties in contest, the king and the parliament, as it existed at the time of the attempted arrest; for we cannot justly estimate the actions of men, nor fairly bestow on them either praise or blame, unless we know the circumstances under which they acted, from which we may endeavour to ascertain the motives of their conduct."

Another article of great interest is "The Watchmen of Eldagsen," in which an account is given of a German criminal trial, with the sentence of one of the supposed murderers of two women, but the accused is afterwards shown to have been innocent, the murders having been committed by another person. The whole article is a good exposure of the German system of criminal procedure, and a perusal will satisfy any reasonable person that our much-abused system is infinitely preferable. Another very readable article is that entitled "Reporters and Reporting," in which the authority due to some of the old reporters is canvassed at some length. From this article we take the following respecting the Year-books and old reporters, which may be contrasted with what is stated under that portion of our publication devoted to "LAW STUDIES:"—

"It strikes one then as most unaccountable, that since the period when the Year-book ceased—that is to say, before the end of the reign of Henry VIII.—no organised system has ever been adopted for collecting and registering the decisions of English courts of justice. The reports called the Year-books appear to have been executed by persons appointed and paid by

the Crown, and to have been published at the expense and with the authority of the Crown, but with no object of disseminating a knowledge of the matters decided among the people. The extreme conciseness with which these reports are expressed, the Norman-French language, and the contractions (not to speak of other defects and peculiarities) in which they are printed, manifestly adapt them only for the use of men of the legal profession, and that of a generation now gone by, as we may almost literally express it. Not that all the matter to be found in those *annosa volumina vatum* is useless or devoid of interest; Hallam has recorded his sense of the acute logic and the profound views that abound in them; and Coke has in fact constituted and compiled his commentaries on Littleton's Tenures out of passages transferred from the Year-books, mostly in the very diction (translated) of the originals. Then in places (few it is true) they afford an illustration on questions in history, particularly of constitutional history and views of ancient life and manners, particularly of conventual life, attractive to an antiquary, but probably, on the whole, hardly worth the toil and time requisite for the discovery and exhumation of them. In *Seymour v. Barker*, 2 Taunt. 201, when a very learned counsel, Serjeant Williams, was citing a case as in point from 7 Edw. III., Mansfield, C. J., interrupted with, 'It is a great way to go back for a precedent to the 7th Edw. III.,' &c.; and Heath, J., added, 'Come to modern precedents, something within three hundred years.' On the other hand, the courts frequently avail themselves of the lore contained in the Year-books and other old reports, when the subject requires a resort to the ancient sources of original law; a remarkable instance of which, among others, may be seen in *Outram v. Morewood*, 3 East, 346, on a question of pleading a verdict by way of estoppel. At any rate, we do not propose getting up an examination of the character of these ancient and almost obsolete representatives of law; it is rather from the more modern reports, and from some inquiry into the later styles of reporting, when we arrive at them, that we hope, if it may be, to render this article in some degree useful. We perfectly concur in the justice of the following remark of Chancellor Kent, as applicable not merely to the Year-books, but to a great number of the elder reports:—'The ancient reports are going very fast, not only out of use, but out of date, and almost out of recollection. The modern reports, and the latest of the modern, are the most useful, because they contain the last, and it is to be presumed the most correct, explanation of the law, and the most judicious application of the abstract and stern principles of right to the refinements of property. They are likewise accompanied by illustrations best adapted to the inquisitive and elevated reason of the present age.'

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## Vendors and Purchasers.

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**CHARGE OF DEBTS.**—Constructive power of trustee to sell or mortgage  
—Lapse of time from testator's death—Constructive notice.—Although as a

general rule, where a testator devises property to trustees upon trust to pay debts, &c., a trustee has power to sell or mortgage for that purpose, and a purchaser or mortgagee is not bound to inquire into the details, whether this applies to a trustee so proposing to sell at any interest—*Quære*. If a trustee, under a trust to convert and pay debts, borrows money on the representation that he requires it for the will, but it is obvious from the nature of the transaction that he requires it for his own purposes, the mortgagee cannot sustain the security against the *cestui que trusts*, nor can a transferee of the mortgagee do so; and the circumstance that such transferee converts an equitable into a legal mortgage makes no difference. On such a transaction the question of constructive notice does not arise. *Bury v. Trueman*, 8 Week. Rep. 635.

**MISDESCRIPTION.**—*Premises well supplied with water—Claim for compensation.*—Some freehold premises in a manufacturing town, comprising a dwelling-house and a factory, on which was a steam-engine with boilers, were put up for sale, and in the particulars of sale described as being well supplied with water. One of the conditions of sale provided for compensation in the event of error or misstatement. The property was sold for £1,720, but immediately after the sale the petitioner discovered a fact with which he was previously wholly unacquainted—viz., that there was neither spring nor running stream upon the property, but that the only water supply was from a waterworks company, and that the annual rate for the quantity of water which the machinery would require was about £23. Upon making this discovery he claimed compensation, but this was refused by the vendors, and Stuart, V. C., held that he had no right either to compensation or to be discharged from the contract. On appeal, however, it was held, that the description was calculated to mislead a stranger, by inducing him to think that there was a well or stream upon the premises, and that the statement was therefore materially inaccurate; and the petitioner was, upon the election of the vendors, relieved from the contract. *Leyland v. Irthingworth*, 2 Law Tim. Rep. N. S. 587.

**SPECIFIC PERFORMANCE.**—*Agreement for lease—Covenants—Uncertainty.*—The following is an instance of the refusal to enforce an agreement by reason of its vagueness, and the case shows that the plaintiff is not always entitled to the benefit of a different agreement set up by the defendant's answer. It appeared that a landlord gave to his tenant a memorandum in the form of a letter to the following effect:—"Sir,—Agreeable to our covenants with regard to the farm which you hold of me, I acknowledge myself bound to grant you a running lease of seven, fourteen, or twenty-one years, whenever you may require the same, to be completed according to these respective terms." The meaning of the word "covenants" was uncertain, owing to a conflict of testimony between the landlord and tenant: Held, that the memorandum of agreement was too vague to call for a decree for specific performance. A plaintiff may not at the hearing adopt the terms which the defendant has set up as constituting the real agreement, if he has throughout the transaction repudiated such agreement. *Jeffery v. Stephens*, 8 W. R. 427.

## Summary of Decisions.

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### EQUITY AND CONVEYANCING.

**HUSBAND AND WIFE.**—*Equity to a settlement—Suit to raise legacy charged on land—Husband's assignee for value—Law and equity—Jurisdiction—Demurrer—Payment into court—Injunction.*—The Court of Chancery will interfere when the remedy is more complete and perfect in equity than it is at law. The court will not refuse to entertain a suit which is properly instituted, or to protect the owner from being harrassed by double proceedings at law and in equity, merely because the effect of its interference is to give a married woman that equity to a settlement which she could not otherwise obtain. A testator by his will charged his real estate with the payment of a legacy of £1,000 to his daughter, and he declared that it should be lawful for her to enter on the lands, and by the receipt of the rents and profits thereof, or by demise, sale, or mortgage, to raise the same. Before any part of the legacy was raised, the daughter married, and her husband assigned to the Family Endowment Society all his interest in the said legacy by way of mortgage to secure certain sums advanced by them to him. The wife now filed a bill by her next friend for the purpose of having the legacy raised by a sale or mortgage of the said real estate, and the owner of the lands charged being willing to pay the whole amount claimed into court, prayed that he might be at liberty to do so, and that on such payment the said society might be restrained by injunction from proceeding at law to recover the legacy: Held (on demurrer), that a person who was entitled to a legacy charged on land might come to a court of equity to have it raised, and, therefore, that the demurrer must be overruled. Held (on motion for leave to pay the money into court), that the right of the present owner upon whose lands the legacy was charged, to pay the money into court, flowed from the overruling the demurrer. Held (on motion for injunction), that upon the payment of the money into court, the injunction must go to restrain the society from prosecuting their action at law against the present owner of the estate charged. *Duncombe v. Greenacre*, 8 Week. Rep. 657.

**MORTGAGE.**—*Postponement of first mortgage—Title-deeds in hands of mortgagor—Fraudulent sale to purchaser—Negligence not amounting to voluntary misconduct.*—A court of equity will not postpone a first mortgagee, or prevent him from availing himself of his legal rights upon the ground that he has allowed the title-deeds to remain in the custody of the mortgagor, and thereby enable him to commit a fraud; unless he has been guilty of a voluntary, distinct, and unjustifiable concurrence in the mortgagor's so retaining them. A solicitor who was entitled to property situate at X. and Y., mortgaged both estates to a client (the plaintiff) and sent him a bundle endorsed with a memorandum that it contained the deeds and mortgage of

the premises for securing the mortgage money and interest. The mortgagee trusting to the representation contained in such endorsement, did not examine the contents of the parcel, which, in fact, only contained the title-deeds to estate X. The mortgagor then sold the estate Y. to a purchaser (the defendant) by public auction, concealing the mortgage, and on the completion of the purchase, handed over the title-deeds thereto to the purchaser, who took possession. The mortgagor afterwards absconded, when the mortgagee discovered for the first time that the defendant had bought estate Y., and was in possession: Held, that as the mortgagee had not voluntarily and unjustifiably permitted the title-deeds to estate Y. to remain in the mortgagor's hands his claim was not postponed, and that unless the defendant chose to redeem, he was entitled to the common decree for foreclosure. *Hunt v. Helmes*, 7 Week. Rep. 632.

**MORTMAIN.**—*Lands in mortmain—Enrolment.*—Where lands have been given for a charitable purpose by a deed duly enrolled within the provisions of the Statute of Mortmain, that statute does not require that deeds affecting the subsequent dealings with such property should be enrolled. *Ashton v. Jones*, 8 Week. Rep. 633.

**TRUSTEES.**—*Appointment of new trustees—Vesting order—Trustees Act, 1850, ss. 32, 34.*—Where new trustees had been appointed under a power, but the trust-estates remained vested in the representatives of a former trustee, who had died abroad, the court made an order re-appointing the trustees who had been already appointed under the power, and ordered that the trust-estate should vest in such trustees under the 34th section of the above act. *Re Mundel's Trust*, 2 Law Tim. Rep. N. S. 653.

**VOLUNTARY CONVEYANCE.**—13 Eliz. c. 5—*Creditors in futuro.*—The 13 Eliz. c. 5, "An act against fraudulent deeds, alienations," &c., renders void conveyances made to defeat future creditors. Therefore, where a man against whom two actions of trespass were brought several days before the trial executed a conveyance of all his property to his daughter as a volunteer, it was declared that the deed was fraudulent and void as against his creditors under the statute of Elizabeth. *Barling v. Bishopp*, 2 Law Tim. Rep. N. S. 651; 8 W. R. 631.

**WASTE.**—*Devisee subject to executory devise—Legal waste—Equitable waste.*—Devisee in fee subject to an executory devise over cut down timber, some of which was ornamental: Held (affirming the decision of Wood, V. C.), that he was punishable of legal but not of equitable waste. *Turner v. Wright*, 2 Law Tim. Rep. N. S. 649.

**WILL.**—*Construction—Illegitimate children—Evidence of knowledge by testator of another person's family.*—Gift by will to A.'s daughters, B.'s daughters, and to E. and F. in equal shares. B. died some time before the date of the will, and never had any legitimate children, but left two illegitimate daughters, one of whom (D.) survived the testator: Held, that although a knowledge of the state of B.'s family could not be assumed in the testator, the existence of such knowledge might be established either



upon the face of the will, or by evidence dehors the will—upon which D., though illegitimate, was held entitled to share in the bequest. *Re Herbert's Trusts*, 8 Week. Rep. 660.

#### EQUITY PRACTICE.

**COSTS.**—*Right of parties claiming subject to the plaintiff's claim to costs out of the fund.*—Where a testator left an estate to his wife charged with legacies, and she married again and settled the estate, which was afterwards sold under the decree of the court for the administration of the testator's estate: Held, that parties claiming under the settlement were entitled to their costs out of the proceeds of the sale of the estate before division amongst the legatees, but to one set of costs only. *Musson v. Hackett*, 2 Law Tim. Rep. N. S. 592.

**INFANT.**—*Petition—Guardian ad litem of infant.*—Upon a petition for the payment out of court of two-thirds of a sum of stock and cash standing to the account of the trusts of a will where the person entitled to the remaining one-third was an infant: Held, that the appointment of a guardian ad litem on behalf of the infant was necessary. *Re Ward*, 2 Law Tim. Rep. N. S. 82.

**SOLICITOR AND CLIENT.**—*Bill of costs, taxation—Payment of bill—Undue pressure—Overcharges—Account current and bills of costs—Security for.*—The rule is well settled that if a client wishes to tax his solicitor's bill after payment, he must show either undue pressure and overcharge, or overcharge to such a degree as to amount to fraud. The following case was held to be within the first branch of that rule:—The petitioner employed the respondent as his solicitor for several years, and became indebted to him for costs for business done and advances. In July, 1858, the solicitor obtained from the petitioner an assignment of all his stock, chattels, &c., with an immediate power of sale to secure all sums then due or which might thereafter become due. In Jan., 1859, the solicitor sent in his bill and cash account, and having urged payment, the petitioner in March, 1859, consulted another solicitor. Much correspondence ensued for the next two months, the petitioner complaining that vouchers were not produced, and the solicitor offering to produce the vouchers, when an appointment for settlement should be made, and to have his bill taxed; but nothing further having been done, the solicitor ultimately gave written notice that he should on the same day on which the notice was given, enter into possession of the petitioner's goods, &c., under his security; and default being made, he did so without further notice. The petitioner then paid the amount expressly under protest, and soon after presented his petition to have his bill of costs taxed, notwithstanding payment, relying on these circumstances as showing undue pressure, and alleging also numerous items of excessive charges. *Wood v. C.*, thought there had been no undue pressure, and that the alleged overcharges were trifling in amount, and he dismissed the petition, but without costs. The petitioner having now

appealed, it was held (reversing his Honour's decision), that payment made under these circumstances was not such as to preclude the petitioner from his right to have the bill taxed, and an order for taxation was made accordingly. *Re Foster*, 2 Law Tim. Rep. N. S. 558.

**SUBSTITUTED SERVICE.**—*Defendant abroad on her Majesty's service*—*Decree for payment of money*—*Substituted service thereof*.—A decree for payment of a sum of money was made against the defendant, who was British Consul at Pernambuco, where he was residing throughout the proceedings in the suit, his defence being conducted by his solicitor in this country, without any attempt having been made to serve the defendant personally. Stuart, V. C., ordered substituted service upon the solicitor to be good service on the defendant, and on appeal the Lords Justices confirmed his Honour's order. *Griffiths v. Cowper*, 2 Law Tim. Rep. N. S. 589.

## COMMON LAW.

**CARRIER.**—*Railway company*—*Railway and Canal Traffic Act, 1854*—*Carriers Act*—*Special contract*.—The following is a case of importance as to railway companies limiting their liability for loss or injury to goods by special contract. It was an action against defendants, as common carriers, for negligence in carrying marble chimney-pieces. Plea, that the said goods were delivered by the plaintiff and received by the defendants, subject to a special contract whereby defendants were not to be responsible for loss or injury to them unless declared and insured according to their value, and that the same were not so declared and insured. Plaintiff was the owner of the chimney-pieces, and directed M. to forward them to London. On June 12, 1857, notice was delivered to M., stating, among other things, that the defendants "would not be answerable for loss or injury to marbles, unless declared and insured according to their value. M. sent the chimney-pieces to defendants' office, with a verbal inquiry as to what the insurance would be, to which defendants sent a written answer to the effect that the amount of the insurance depended on the value of the articles, and requesting in turn to know the value. M. thereupon wrote to ask the rate of premium. On July 16 defendants wrote to M., saying, among other things, "It is necessary before fixing the rate of insurance, that we should perfectly understand the nature and amount of risk we are about to undertake, and we will lose no time in getting the rate of insurance fixed when you oblige us with the information." Subsequently verbal messages passed between the parties prior to August 1: and defendants' clerk stated in the result that he would not forward the goods unless he had written orders as to the amount for which the goods were to be insured if insured, stating the rates for insured and uninsured goods. No intimation was given to M. as to the amount for which the goods were to be insured; and on August 1 M. wrote to defendants—"Please to forward the goods uninsured, directed to, &c., signed C. Meigh, per W. G. Whittingham." The goods were accordingly sent off, and the charge made as for

uninsured goods. The goods were injured on the journey: Held, on the above facts, reversing the judgment of the Queen's Bench (Williams, J., *dissentiente*), that there was a special contract, signed by the plaintiff or the person delivering the goods, for carriage within the meaning of the 14th proviso in the 7th sec. of the 17 & 18 V. c. 31, Railway and Canal Traffic Act, 1854, which limited the liability of the defendants. Also, that the letter of August 1, and the forwarding of the chimney-pieces by the defendants upon the terms proposed in it, was a special contract within the 6th sec. of 2 Geo. 4 and 1 W. 4, c. 68 (the Carriers Act). Also, that the letter of August 1 might be read, 1st, with the light cast upon it by the Carriers Act; 2ndly, by that of the other letters and facts stated in the case; and, 3rdly, simply by itself; and that in either of these cases it constituted a contract for the carriage of the marble upon the terms that defendants should be free of risk: Held, also, that the above plea was proved. *Peck v. The North Staffordshire Railway Company*, 8 Week. Rep. 364.

COMMON CARRIERS.—*Fish—Special contract—17 & 18 V. c. 31, s. 7—Liability for delay.*—This is another case of a special contract by a railway company for the carriage of goods being upheld, for where a railway company has given public notice that it will carry fish as by special agreement only, and the sender has signed an order and declaration exempting the company from all liability for loss or injury arising from delay or detention of train, or from any other cause other than gross neglect or fraud, it was held that such condition is a reasonable one, and the special agreement is valid. *Re Beal*, 2 Law Tim. Rep. N. S. 665.

COPYHOLD.—*Custom for copyholder of inheritance to get clay for bricks without limit.*—In ejectment by the lord of a manor for forfeiture, evidence was given of an immemorial usage for the copyholders of inheritance, without license from the lord, to break the surface and get clay without limit from their copyhold tenements, for making bricks, to be sold off the manor: Held, that the custom was good. *Salisbury v. Gladstone*, 8 Week. Rep. 642.

DAMAGES.—*Tort—Negligence—Malice aggravating damages.*—In an action for negligence the damages may be aggravated by the conduct of the defendant having been reckless or accompanied by expressions showing a disregard for the safety or property of others. In an action for negligence in pulling down a wall, whereby a portion of the bricks fell upon the plaintiff's stable, broke down the roof and damaged his horse, &c., the judge told the jury that in assessing the damages they might take into consideration expressions of the defendant to the workmen that they should not take any care to guard against mischief to the plaintiff's property in so doing: Held, that there was no misdirection. *Emblin v. Myers*, 8 Week. Rep. 665.

SHIPPING.—*Certificate of registry, custody of—Merchant Shipping Act, 1854—17 & 18 V. c. 104, s. 50.*—The Merchant Shipping Act, 1854, forbids a shipowner pledging the certificate of registry of a ship, and a pledgee

cannot detain the certificate even though he may have given consideration for it. *Wiley v. Crawford*, 8 Week. Rep. 662.

#### PROBATE AND DIVORCE.

**DISSOLUTION OF MARRIAGE.**—*Bigamy and adultery—Evidence of foreign law as to marriage.*—To establish bigamy as a ground for the sentence of the court there must be proof of such a ceremony as but for a former marriage would constitute a valid marriage. Thus, if the bigamy relied upon took place abroad, it will be necessary to give formal proof of the marriage law of that country. *Burt v. Burt*, 8 Week. Rep. 552.

**MARRIAGE.**—*Evidence—Admissibility of certificate of a foreign marriage.*—In proof of a marriage in Chili a document was tendered purporting to be an extract from a register of marriages, and signed by the curate-rector of the church where it was solemnised. His signature was verified by a public notary, whose signature was verified by other notaries, and their signatures were verified by the Foreign Minister of the Chilian Republic, and a certificate under the hand and seal of the British consul at Chili was added. On the evidence of a witness that a register was kept by the curate-rector of every church in Chili of marriages solemnised in it, and that certificates of marriage such as that tendered were in the Chilian courts received in evidence, that he knew the name of the curate-rector, and was also well acquainted with several of the persons whose signatures were appended to the certificate as witnesses, the document was admitted as evidence of the marriage. *Abbott v. Abbott and Godoy*, 29 Law Journ. Prob. & M. 57.

**WILL.**—*Imperfect revocation—1 V. c. 26, s. 20—Cancellation—Intention to execute another will.*—After a testator's death a duly executed will was found, but the testator had written the word "cancelled" and his initials across his signature, and at the end he had written a memorandum in which he said, "I hereby revoke this will, and it is altogether cancelled," and "I intend to make another will, whereupon I will destroy this." The court granted probate to the executor, as the will had not been revoked in any of the modes prescribed in the 20th section of the Wills Act. *Re Brewsted*, 29 Law Journ. Prob. & M. 69.

**WILL.**—*Re-execution of will—Attestation of alterations.*—Tracing signatures with a dry pen does not amount to a re-execution or a re-attestation of a will. Some alterations having been made in a will subsequent to execution, the testator and the attesting witnesses traced the former signatures with a dry pen, and the attesting witnesses wrote their initials in the margin opposite each alteration. The court held that these initials were no evidence of a due execution of the alterations, and refused to admit them to probate. *Re Cunningham*, 29 Law Journ. Prob. & M. 71.

## Moot Point.

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### No. 50.—*Apprentice—Illness.*

A., a minor, and B., his mother, enter into an indenture of apprenticeship of A. to C. The indenture contains the usual covenant, that A. shall serve C. for the term of the apprenticeship, without excepting the case of illness. During the term A. is obliged to leave the service of C. in consequence of illness, and his medical attendant has certified that it would be dangerous to A.'s life for him to resume his employment. C. (to whom a large premium was paid) demands compensation from B. for the loss of A.'s services, and threatens to bring an action to recover the same. Will such an action lie; and, if so, is it probable that any beyond nominal damages would be given?

J. W., JUN.

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## Answers to Moot Points.

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### No. 46.—*Legacy Duty (ante, p. 131).*

I think A. B., though son-in-law to the testator but stranger in blood, is liable to payment of legacy duty at the rate of ten per cent., *vide* Sweeting v. Sweeting, 22 L. J. R. N. S. Chanc. 441; 1 Drew. 331, where it was held, *vice versâ*, that a daughter-in-law was liable to the duty payable by a stranger in blood.

E. SHEARM.

### No. 46.—*Legacy Duty (ante, p. 131).*

Under the Succession Duty Act, 16 & 17 V. c. 51, s. 11, a son-in-law pays duty as a son, viz., one per cent.; if the legacy, however, became payable previous to the passing of the act he would pay ten per cent.

J. SHEARM.

### No. 48.—*Repairs (ante, p. 132).*

It is quite clear there was no covenant for repairs in the lease from B. to A. (how B. stood with C. is another thing); A. therefore could not be compelled to repair, but should have called upon B. or his representatives to do so as his immediate landlord. If B. or his representatives requested A. to repair, in that case he would have had his remedy; as the case now stands I think he has none.

J. W.

## RECENT STATUTES.

### 23 VICTORIA, AND 23 & 24 VICTORIA.

The last session of parliament comprises some statutes of the 23rd Vic., but the greater portion belong to the 23 & 24 Vic. Of the result it is the fashion to speak most disparagingly, and, indeed, compared with the programme at the opening of the session, it must be confessed that there is some ground for complaint, inasmuch as the bills relating to reform, bankruptcy, and criminal law, and joint stock companies consolidation, with others of a less doubtful utility—and in particular the Registration of Titles Bill—were not permitted to emerge from their chrysalis state. But the measures which received the royal approbation are some of them of no small importance, such as the act for the regulation of attorneys and solicitors, and containing provisions for facilitating admission to the profession (the numbers being considered too few now that the business and also the emoluments are diminished), the Conveyancing Act shortening deeds, the Law of Property Amendment Act, relating chiefly to registered judgments, the Fusion of Law and Equity Act (which, however, was greatly shorn of its too luxuriant growth), the Evidence in Chancery Act, the final abolition of the Masters in Chancery, the Divorce Court Amendment Act, the Stamp Act, particularly as to agreements, the Licensing of Refreshment Houses, the repeal of the Stock Jobbing Act, Procedure on Petitions of Right, &c.

We purpose to give the most important of the acts at length, whilst others of less practical importance will be shortly noticed; but on this occasion we shall not indulge in any lengthy remarks, but find some other and more convenient opportunity for doing this.

#### 23 VIC. CAP. 8.—ADMINISTERING OF POISON ACT.

This act provides for a punishment for the administration of poison, where there is no intent to commit murder, but only to endanger life or inflict grievous bodily harm.

SEC. 1. *Any person maliciously administering poison, &c., with intent to endanger life or inflict grievous bodily harm to be guilty of felony.*—That whoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable to be sentenced to penal servitude for any period not exceeding ten years and not less than three years, or to imprisonment for any term not more than three years, with or without hard labour, at the discretion of the court.

SEC. 2 *Any person maliciously administering poison, &c., with intent to injure, aggrieve, or annoy any other person, to be guilty of a misdemeanor.*—Whosoever shall unlawfully and maliciously administer to or cause to be adminis-

tered to or taken by any other person any poison or other destructive or noxious thing with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be sentenced to imprisonment for any period not exceeding three years, with or without hard labour, at the discretion of the court, and the costs and expenses of the prosecution of any such misdemeanor may be allowed by the court as in cases of felony.

SEC. 3. *If the jury be not satisfied that any person charged is guilty of felony, but guilty of misdemeanor, they may find him guilty accordingly.*—If, upon the trial of any person charged with the felony above mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of the misdemeanor above mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon the delinquent shall be liable to be punished in the same manner as if convicted upon an indictment for the misdemeanor.

#### 23 VIC. CAP. 14.—INCOME TAX ACT.

This is the Income Tax Act, which has so unpleasantly affected many persons; sec. 2 regulates the amount of tax thus: upon the annual value or amount of any property, profits, or gains (except property, profits, and gains described as chargeable under Schedule B. of the said act) the rate or duty of tenpence for every twenty shillings of the annual value or amount of all such property, profits, and gains respectively; and for and in respect of the occupation of lands, tenements, hereditaments, and heritages described as chargeable under Schedule B. of the said act, the rate or duty of fivepence in England and threepence halfpenny in Scotland and Ireland respectively for every twenty shillings of the annual value thereof. However, by sec. 9 incomes under £100 are exempted, and under £150 the rate is sevenpence in the pound.

#### 23 VIC. CAP. 15.—STAMP DUTIES ACT.

This is an act of some importance, inasmuch as it affects some of the rates of duty, and also contains some special provisions applicable to personality appointed by will, the use of adhesive stamps in certain cases, and penalties, and particularly that the penalty on stamping on agreement under the value of £20 shall be 20s. only, and that agreements for leases shall be stamped with the same duty as is payable on leases, and reducing the rates for agreement. This last provision is as follows: "Agreement, or any minute or memorandum of an agreement, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise charged nor expressly exempted from all stamp duty, where the matter thereof shall be of the value of £5 or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument; together with every schedule, receipt, or other matter put or indorsed thereon or annexed thereto, sixpence. And where the same shall contain 2,160 words or upwards, then for every

entire quantity of 1,080 words contained therein over and above the first 1,080 words a further progressive duty of sixpence. Provided always, that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any of such letters shall be stamped with a duty of one shilling, although the same shall in the whole contain any quantity of words exceeding 2,160.

23 & 24 VIC. CAP. 32.—BRAWLING IN CHURCHES, &c.

This statute has for objects to abolish the jurisdiction of the ecclesiastical courts in Ireland (as has already been done in England) in cases of defamation, and in England and Ireland in certain cases of brawling; the latter provisions were inserted in consequence of the well-known disturbances at the church in St. George's-in-the-East; it is entitled "An Act to abolish the jurisdiction of the Ecclesiastical Courts in Ireland, in cases of defamation, and in England and Ireland in certain cases of brawling," and it introduces into the law some very useful provisions. As regards its application to England it abolishes the power of the ecclesiastical courts to deal with cases of brawling, and gives to justices at petty sessions a more full and complete power of action in such and similar cases than they before possessed. Already, by the 1 Mary, ses. 2 & 3, ss. 2, 3, & 4; 1 Will. & M. c. 18, s. 18; 52 Geo. 3, c. 155, s. 12; and 9 & 10 Vic. c. 59, s. 4, the temporal courts had a limited power to deal with such offences, but it required the present statute to confer upon them complete and ample jurisdiction. The first section deprives the ecclesiastical courts of all power to entertain or adjudicate upon any suit or cause of brawling against any person not being in holy orders. The second section enacts that "Any person who shall be guilty of riotous, violent, or indecent behaviour in England or Ireland, in any cathedral, church, parish or district church, or chapel of the Church of England and Ireland, or in any chapel of any religious denomination, or in England, in any place of religious worship duly certified under the provisions of the 18 & 19 Vic. c. 81, intituled 'An Act to amend the law concerning the certifying and registering of places of religious worship in England;' whether during the celebration of divine service, or at any other time, or in any churchyard or burial-ground, or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorised to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament, or any divine service, rite, or office in any cathedral church, or chapel, or in any churchyard or burial-ground, shall, on conviction thereof before two justices of the peace, be liable to a penalty of not more than £5 for every such offence, or may if the justices before whom he shall be convicted see fit, instead of being subject to any pecuniary penalty, be committed to prison for any time not exceeding two months."

23 & 24 VIC. CAP. 34.—PETITIONS OF RIGHT ACT.

This is an act to amend the law relating to petitions of right, and to simplify the procedure therein and the recovery of costs by and against the



Crown. The following are the provisions relating to the initiating of such petitions :—

SEC. 1. *Petitions of right may be intituled in any of the superior courts at Westminster—The form, nature, and contents of the petition as in schedule No.*

1.—A petition of right may, if the suppliant think fit, be intituled in any one of the superior courts of common law or equity at Westminster in which the subject-matter of such petition or any material part thereof would have been cognisable if the same had been a matter in dispute between subject and subject, and if intituled in a court of common law shall state in the margin the venue for the trial of such petition; and such petition shall be addressed to her Majesty in the form or to the effect in the schedule to this act annexed (No. 1), and shall state the Christian and surname and usual place of abode of the suppliant and of his attorney, if any, by whom the same shall be presented, and shall set forth with convenient certainty the facts entitling the suppliant to relief, and shall be signed by such suppliant, his counsel or attorney.

SEC. 2. *Petition to be left with the Secretary of State for the Home Department for her Majesty's fiat.*—The said petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to her Majesty for her Majesty's gracious consideration, and in order that her Majesty, if she shall think fit, may grant her fiat that right be done, and no fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same.

SEC. 3. *Upon fiat being obtained, petition, &c., to be left at office of Solicitor of the Treasury endorsed as in schedule No. 2.*—Upon her Majesty's fiat being obtained to such petition, a copy of such petition and fiat shall be left at the office of the Solicitor to the Treasury, with an endorsement thereon in the form or to the effect in the schedule (No. 20) to this act annexed, praying for a plea or answer on behalf of her Majesty within twenty-eight days, and it shall thereupon be the duty of the said solicitor to transmit such petition to the particular department to which the subject-matter of such petition may relate, and the same shall be prosecuted in the court in which the same shall be intituled, or in such other court as the Lord Chancellor may direct.

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## AUCTIONEER'S RIGHT TO RECEIVE DEPOSIT.

CONDITIONS of sale provide that the purchaser shall pay into the hands of the vendor's solicitor a deposit of £10 per cent. on the purchase money. At the time of sale a dispute arises between the vendor's solicitor and the auctioneer, the latter contending that the custom is to pay the deposit into the hands of the auctioneer. The former (the solicitor) contends that there is no immemorial custom that the auctioneer shall receive the deposit; and that, as the rule always is to pay the balance of the purchase money into

the hands of the solicitor, this is *prima facie* evidence that the solicitor is the party entitled, at common law, to receive such deposit.

Although, perhaps, the rule in London is to allow the auctioneer to receive the deposit, the direct reverse, I believe, is the case with regard to country sales.

Suppose that, in consequence of this dispute, the property be not sold, is the solicitor or the auctioneer liable to an action? The auctioneer in the present case was chosen by the vendor himself, and not by the vendor's solicitor.

The above point was mooted by me in the *Solicitors' Journal*, of the 15th inst., and one of the correspondents of that journal ("E. M.") "thinks there is a custom for the auctioneer to receive the deposit. There is," he continues, "no custom for the solicitor to receive the purchase money. It is not necessary, and ought not to be done." Why not? In "*Prideaux's Precedents*" (last edition), although the deposit is there directed to be paid into the hands of the auctioneer, the remainder of the purchase money is to be paid "at the office of the vendor's solicitors." And this, I think, is—with regard to the balance of the purchase money—the (or almost the) invariable practice of the present day. In a short article on this subject in the *LAW CHRONICLE*, Vol. I. (old series), p. 236, it is said (speaking of the recommendation of the Incorporated Law Society, that the deposit should be paid into the hands of some banker), "This recommendation is confined to London, but it might be adopted by country practitioners, who sometimes, but not so generally as in town, permit the auctioneer to retain the deposit, to the manifest peril of the vendor."

The following is the suggestion referred to:—The attention of the Incorporated Law Society has been directed to the present practice in *London*, of making deposits on the sale of property by auction, payable into the hands of the auctioneer, to be held by him until the sale is completed or abandoned. The council, having considered this important matter, have arrived at the conviction that a change is necessary; that the present custom of requiring the deposit to be retained by the auctioneer should no longer be followed; and that it would be advisable, on the sale of property by auction, that a condition to the following effect be adopted—namely,

"That all deposits on account of purchase money, on sales of estates by auction in *London* (italicised), be paid to the auctioneer, who shall, immediately after the sale, pay the same into a bank to be named by the vendor in the conditions of sale, in the joint names, and subject to the joint order, of the vendor and purchaser, or their nominees, and at the vendor's risk."

The adoption of this course will enable the parties to place the money in a bank where interest is allowed, or to invest it in Exchequer Bills or stock, or to effect any other arrangement respecting it, that may be mutually desired, for making the deposit safe and productive. In such case the interest would belong to the party ultimately entitled to the deposit.

This rule of paying the deposit into a bank is, I believe, very frequently adopted, especially in regard to London sales; and the rule is a good one;

but this is not the point we are discussing—that point being whether, by the common law, and therefore by immemorial custom, the auctioneer can insist upon receiving the deposit, and whether, in case of dispute, and the sale being thereby prevented taking place, the solicitor or auctioneer (either, neither, or both) would be liable to punishment. I had a few further remarks to make on the subject, but time prevents me, being so late in the month.

I shall be happy to receive the opinions of subscribers and others, upon the points above referred to.

JOHN W. S. LAVENDER.

Kidderminster, Sept. 25, 1860.

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## Summary of Decisions.

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### EQUITY AND CONVEYANCING.

**ESTATE TAIL.**—*Heirs male of the body.*—Where there was a devise to A. for life, and after his decease to the heirs male of his body for their lives in succession, in such parts or proportions amongst them as A., their father, should by deed or will appoint: Held, that heirs male of his body meant sons, and that A. had therefore only a life estate. *Jordan v. Adams*, 8 Week. Rep. 580.

**MORTGAGE.**—*Forfeiture of mortgagor's right of redemption*—*Statute against clandestine mortgages* (4 & 5 W. and M. c. 16).—The statute against clandestine mortgages (4 & 5 W. and M. c. 16) applies only to cases of actual mortgage. Therefore, a deed simply charging money on land, but containing a covenant to execute a mortgage when required to do so, although a mortgage in equity, is not a mortgage within the meaning of that statute, nor is a deed of further charge without a proviso for redemption. The remedy given by the statute is entirely negative, and simply deprives the mortgagor of his right to relief, or the equity of redemption against the second mortgagee, and therefore it is not competent for such mortgagee to come to the court to put the statute in force against a fraudulent mortgagor. The statute does not take effect against a fraudulent mortgagor until the expiration of the period of redemption. *Kennard v. Futvoye*, 29 Law J. Ch. 553.

**MORTGAGE.**—*Redemption*—*Power of Sale*—*Notice*—*Trustee.*—The following is an important case as to the exercise by a mortgagee of a power of sale, and the protection of a purchaser from a mortgagee. P. mortgages certain leaseholds to C. with power of sale, and in such power is contained the condition of three months' previous notice in writing, with indemnity to a purchaser upon the vendor's receipt, and with respect to seeing

that the notice is given and the expediency of the sale. P. afterwards conveys the same and other premises to H. & Co. upon trust, to sell and to secure a sum advanced, and gives a written authority to H. & Co. to receive the rents and to make payments. P. dies, and having no representative, C. sells under his power to H. & Co., but the three months' notice is not given. Administration is then taken out of P.'s estate, and H. & Co. render an account to the administratrix, who fourteen years afterwards files two bills, one against C. for redemption, and gets a decree for redemption, but not prosecuting it is foreclosed; the other against H. & Co. to set aside the sale as at an undervalue, and invalid by reason of the relative position of the parties, and being without the prescribed notice: Held, that the ground of undervalue was not made out, that it was a grave question whether a sale by persons in such a position and under such circumstances was valid, but that the three months' notice not having been given, inasmuch as both parties knew that it could not be given, the indemnity clause did not protect the purchasers, who were mortgagees and not owners, and that the plaintiff was entitled to redemption. *Parkinson v. Hanbury*, 8 Week. Rep. 575.

**PARTNERSHIP.**—*Goodwill—Banks of issue and deposit—Bank notes right to issue—Survivorship—Accounts.*—If two or more partners carry on business, and one dies, his share of the goodwill is assets as part of his estate, but the value of his share will be computed with reference to his interest, limited, however, by any rights which may survive to his copartners. Where, therefore, after the death of a partner, his copartner could carry on business alone, or by a slight alteration in the name of the firm, and upon the same premises, and a beneficial privilege vested solely in the surviving partner, who alone could confer that right on other persons: Held, that the value of the share of the deceased partner must be a proportion of the net value, after deducting the amount at which the surviving rights were valued. The privilege conferred by the 7 & 8 Vict. c. 32, of issuing bank notes continues to the surviving members of a banking firm. In the settlement of accounts by executors two or more may bind the others, though with notice of their dissent, provided there is neither fraud nor gross error. Such settlement will also bind their cestuis que trust. *Smith v. Everett*, 29 Law Journ. Ch. 236.

**SETTLEMENT.**—*Heirlooms—Trusts executed and executory—As far as the rules of law and equity will permit.*—Where there is a limitation of real estate in strict settlement, and a declaration of trust of chattels to follow the limitations of the real estate simpliciter, this is a trust executed, and the chattels will vest absolutely in the first taker of an estate of inheritance. An assignment or bequest of personal estate by way of trust executed in favour of one or more tenants for life, with remainder in tail, vests the property absolutely in the first tenant in tail immediately upon his birth, and this whether the limitations are direct or by way of reference to the limitations of real estate, which reference may be made by simply declaring that the personalty is to be treated as heirlooms. The addition of the

words "so far as the rules of law and equity will permit" to the direction that chattels shall follow the limitations of the real estate will not have the effect of altering this rule, or, in other words, will not render the trust executory instead of executed. Where the trust is executory (that is, where the author of the settlement has directed trusts to be afterwards framed),—*semble*, the court will sanction the introduction of a clause deferring the period of vesting till the tenant in tail attains twenty-one. The introduction of doubtful words, as to the intention that the tenant in tail shall be in possession before being entitled to the chattels, will not have the effect of suspending the vesting. *Lord Searsdale v. Curzon*, 29 Law Journ. Ch. 249.

**STATUTE OF LIMITATIONS.**—*Acknowledgment.*—Where an acknowledgment of a debt contains a reference to a document which would complete the acknowledgment, and such document cannot be looked at because unstamped, the acknowledgment will not suffice. In 1819 A. gave his promissory note to B. for £1,000 advanced to him by her; and retained a legacy of £100 due to him, and in his hands as executor. In 1845 C., the daughter and residuary legatee of B., applied to A. for an acknowledgment: A. wrote—"I have sent you a note for the money due to you which your mother left for you." The enclosed note, signed by A., and stamped with a penny receipt stamp, was a promise to pay £1,100 to C., with interest at four per cent.: Held, that the letter which referred specifically to an instrument improperly stamped, and incapable of being examined by the court, did not constitute a sufficient acknowledgment to take the case out of the Statute of Limitations. *Parmiter v. Parmiter*, 8 Week. Rep. 578.

**WILL.**—*Election*—*Burdensome legacy*—*Tenant for life*—*Permissive waste*—*Custody of title-deeds.*—Where two distinct legacies are given by the same will, one of which is burdensome and the other profitable, the legatee may accept the profitable legacy and refuse the other, unless an intention to connect the two appears by the will; and the doctrine of election does not apply to such a case. *Warren v. Rudge*, 29 Law Journ. Ch. 543.

**WILL.**—*Legacies and annuities*—*Charge on real estate*—*Exoneration of personal estate*—*Charity*—*Gift of money secured on tolls*—*Statute of Mortmain.*—Although the rule is that a testator, who must be taken to know that his personal estate is the primary fund for payment of his legacies and annuities, must use clear and distinct words to exonerate it from such payment, it is not necessary that he should say, in precise words, that he exonerates it if an intention to exonerate can be gathered from the will. A gift to a charity of money secured on the tolls payable under an act for improving the haven of Hedon is void under the Statute of Mortmain. *Ion v. Ashton*, 8 Week. Rep. 573.

#### EQUITY PRACTICE.

**DECREE.**—*Petition to alter after enrolment.*—After a decree has been enrolled, no Vice-Chancellor, nor even the Lord Chancellor, can vary, or

otherwise affect the decree : that can be done only by the House of Lords. After a decree had been enrolled, declaring A. B. entitled to a particular fund as next of kin to a testator, a stranger to the suit presented a petition to be allowed to come in and prove his claim to be entitled to the fund instead of A. B. : Held, that even if the petitioner could show such a cause as would insure his succeeding, the Court had no power to disturb the decree, and the petitioner could only establish his rights by filing a bill for that purpose. *Bauer v. Milford*, 29 Law Journ. Ch. 268.

## COMMON LAW.

**BILLS OF EXCHANGE.**—*Partners—Authority to accept—Style of acceptance—Direction or address.*—It is not a matter of law, but of fact, whether a bill drawn by a firm be or not for partnership purposes. C. and the defendant carried on business as partners in the name of the defendant alone, at Walworth ; and C. or the defendant likewise carried on another business of his own at Woolwich. C., for the partnership purposes, accepted, in the name of the defendant, a bill drawn upon and directed to the defendant, at the place of business at Woolwich : Held (Bramwell, B., dissentiente), that it was a question for the jury, whether the name of the defendant was not the partnership name, and whether, therefore, the defendant was not liable on the acceptance. *Stephens v. Reynolds*, 29 Law J. Ex. 278.

**CHURCHWARDENS.**—*Monition—Church ornaments.*—Churchwardens are a corporation for the purpose of being possessed of the ornaments of the church. A monition directed to A. and B., the churchwardens of the church of St. B., may be amended on an ex parte motion by striking out the names A. and B. *Liddell v. Beal*, 8 Week. Rep. 569.

**COMMISSION AGENTS.**—*Whether commission to be paid only on goods sold and delivered, or upon goods ordered and order accepted.*—Where the plaintiff, who was a commission agent, agreed with the defendant to do business with him, upon the understanding expressed in a letter that he should receive a commission on all goods bought by houses whose accounts were opened through him with the defendant : Held, that the plaintiff was entitled to receive his commission on all goods ordered where the order had been accepted, whether the order had been executed or not. *Lockwood v. Levick*, 8 Week. Rep. 583.

**DISTRESS.**—*For Rent—Time—Sunrise and sunset—Light and darkness—Evidence—Almanac—Time by the clock.*—The old common rule that a distress for rent must be taken in the daytime and not in the night, must be taken to mean not merely that it must be taken in the dark, but that it must be between sunrise and sunset ; and though there may be circumstances under which it may be difficult to determine what will be the proper evidence of sunrise or sunset, yet, ordinarily, the time by the clock, coupled with the almanac, will be some evidence ; if it clearly appears that in any view the distress was before the sun had risen or after it had set, the distress will be illegal. Therefore, in two cases

in one of which the distress was taken at near eight o'clock on an evening when, by the almanac, the sun set just after seven, and in the other it was taken between two and three o'clock on the morning of a day on which, by the almanac, the sun rose at shortly before half-past four, and there was no other evidence upon the point, nor any evidence as to whether, in either case, it was dark when the distress was taken, but the jury in both cases found that it was taken between sunset and sunrise: Held, that the evidence was sufficient to sustain that finding, and that the distresses were therefore illegal. *Sutton v. Darke*, 29 Law J. Ex. 271.

**DISTRESS.**—*Excessive impounding—Locking up room—Exclusion of tenant.*—An action may lie for an excessive distress although the sale (less the expense) does not realise the rent due. Quære, whether the distrainer can lock up the whole of the premises distrained upon so as to exclude the tenant. *Semble*, that he cannot. Where the landlord of a warehouse, let with heavy weaving machines, had distrained property to an excessive amount, and locked up the warehouse, so as to keep the tenant excluded, and the proceeds of the sale less the expense did not equal the amount of the rent due, but there was strong evidence that the value was ten times the amount, and the tenant sued both in trespass and for an excessive distress, a verdict for the plaintiff on both counts, and upon each of them for substantial damages, was upheld. *Smith v. Ashforth*, 29 Law J. Ex. 259.

**DISTRESS.**—*State of pound—Liability of distrainer—Case—Pleading—Evidence—Knowledge.*—A person who distrains cattle damage feasant is bound at his peril to take care that the place in which he impounds them is in a fit and proper state, and is liable for the consequences if it is not. In an action for abusing sheep distrained damage feasant, by putting them into a pound which was in an unfit state, as the defendant well knew, the evidence was that some of the sheep died in consequence of the state of the pound, and that it was in an unfit and improper state: Held, that it was not necessary to leave to the jury explicitly the question whether the defendant knew the unfit state of the pound, for that he was bound to know it, and, moreover, as it was obvious he must be taken to have known it; and a verdict for the plaintiff was supported. *Ignell v. Clark*, 29 Law J. Ex. 257.

**LANDLORD AND TENANT.**—*Notice to quit—Evidence—Sending by post—Hours of business.*—The following is a case of some importance as to serving notices by post:—In an action for rent, and use and occupation of premises up to Lady-day, 1859, there was evidence that a notice to quit at the previous Michaelmas was written and posted on the 25th of March, 1858, in time to be delivered at the office of the landlord's agent (an attorney) in business hours, on the same day, and the jury found, in effect, that it was so delivered: Held, sufficient in the absence of any positive evidence, that it was not delivered before business hours closed. *Papillon v. Brunton*, 29 Law J. Ex. 265.

**LODGING-HOUSE KEEPERS.**—*Liability in respect of goods stolen from lodgers.*—The following case settles the point, that a lodging-house

keeper is not liable, like an ordinary innkeeper, for the loss of his lodger's goods. It appeared that the plaintiff hired apartments in the defendant's house, and, while there, had some of his goods stolen; and the declaration alleged that the defendant did not take due and proper care of his house, by means of which dishonest persons obtained access to it and took plaintiff's goods; to which the defendant demurred, on the ground that the declaration did not allege the defendant to be a common innkeeper, and therefore did not disclose any duty or liability on the part of the defendant: Held, that the declaration was bad, and that the defendant, as a lodging-house keeper, was not liable. *Holder v. Soulby*, 8 Week. Rep. 438.

**SHERIFF.**—*Execution—Landlord and tenant—Claim for rent*—8 Ann, c. 14—*Mortgage—Attornment—Interest—Rent payable in advance.*—The sheriff, on a levy under a *fi. fa.*, is liable to the landlord's claim for rent, under 8 Ann, c. 14, while the goods remain in his hands, even after sale. And the claim may be made by a mortgagee, to whom the mortgagor has attorned tenant, for rent payable in advance, although no interest has become due. On the 22nd of October, 1859, the judgment debtors executed a mortgage to S. and W., with covenant and proviso for redemption, on payment of the principal on the 17th of December next, and interest to be paid on the 22nd of December, and the debtors thereby attorned tenants to the mortgagees at a rent to be paid yearly in advance, the first payment to be on the day of date. On the 9th of December, S. and W. deposited the deed by way of equitable security. On the 20th of December the sheriff seized and sold, and on the 26th had notice of the claim of S. and W. An order having been made on the sheriff, on their application for payment of a year's rent out of the proceeds of the execution, the court refused to set it aside. *Yates v. Radledge*, 29 Law Journ. Ex. 117.

**SLANDER.**—*Privileged communications.*—An action of slander cannot be brought for anything said in the regular course of a judicial proceeding; therefore, where an attorney, in a speech for the defence in a police court, said that the prosecutor had plundered his master, and the prosecutor gained the verdict in an action for slander against the attorney: Held, that the matter alleged to be slanderous, being relevant, was privileged, and that a nonsuit should be entered. *Mackay v. Ford*, 8 Week. Rep. 586.

**TRESPASS.**—*Use and occupation—Title—Contract—Party to sue.*—The action for use and occupation is one of contract, and is founded on the relation of landlord and tenant (*Churchyard v. Ford*, 26 L. J. Ex. 354). The receiver of an estate, in which the plaintiff had an equitable interest, under a settlement, vesting it in trustees, let the defendant into possession of the premises, under an agreement with himself in writing, in which he described himself as agreeing, "on behalf of the estate," to let for a term of years. The plaintiff, declining to sanction any other than a yearly letting, a correspondence ensued between him and the defendant, in which the latter intimated that, as he could not get a lease, he should leave as soon as he could, and he did leave before he had been six months in possession: Held, that he was not liable to the plaintiff, either in trespass, or use and occu-



pation, and *Semble*, that he was not liable at all. *Sloper v. Saunders*, 29 Law J. Ex. 275.

## COMMON LAW PRACTICE.

**ARTICLED CLERK.**—*Omission to give notices.*—Admission of an articulated clerk to practise as an attorney allowed, although the usual entries had not been made in the books at judge's chambers. *Ex parte Waller*, 8 W. Rep. 563.

**COSTS OF ARBITRATION.**—*Counsel attending arbitrator—Accountant—Attorney at investigations by accountant by direction of, but not before, arbitrator.*—It having been the general practice of this court not to allow the costs of more than one counsel attending the arbitrator on each side in cases referred to arbitration, the Master, in taxing the plaintiff's costs of the reference, allowed the costs of only one counsel, two having been employed, on each side; the court refused to make absolute a rule calling on the Master to review his taxation in this respect. Where a professional accountant was employed by direction of the arbitrator to examine the defendants' books at the defendants' counting-house, and to ascertain for the purposes of the reference the amount of profits on certain contracts, as shown by such books, which investigation would otherwise necessarily have been held before the arbitrator himself, and at a greater expense to the parties, the Master, in taxing the plaintiff's costs of the reference, allowed the charges of the accountant, but disallowed the costs of the plaintiff's attorney attending these meetings. The court made absolute a rule calling the Master to review his taxation as to the costs incurred at those meetings. *Hawkins v. Rigby and others*, 29 Law J. C. P. 228.

**INSPECTION OF DOCUMENTS.**—*Common Law Procedure Act, ss. 55, 56—Perfect and oyer.*—The plaintiffs, in an action for diminishing certain water, were held entitled to an order to inspect a deed referred to in the defendants' plea, under which the defendants justified doing the act complained of, although the plaintiffs were no parties to deed, and the same related exclusively to the defendants' title. *The Penarth Harbour, Dock, and Railway Company v. The Cardiff Waterworks Company*, 29 Law J. C. P. 230.

**IRREGULARITY.**—*Verdict—Judgment—Stay of proceedings—Order by consent, non-observance of.*—Signing judgment against an order of *nisi prius* made by consent is an irregularity, although it was also a breach of faith. The judge's note is conclusive evidence of an arrangement at *nisi prius*. In an action of ejectment, a verdict having passed for the plaintiff, the judge stayed proceedings until the fifth day of the ensuing term. During the first four days of a term, cross action of trespass came on to be tried; the defendant therein finding himself not in a position to produce the judgment in ejectment as an estoppel, obtained an adjournment, on the condition that the action of ejectment should abide the result of the action of trespass. The latter action came on again to be tried, and it turned out that not either of the parties but one C. was entitled to the premises. Thereupon, by con-

sent, an arrangement was entered into and made an order of *nisi prius*, to the effect that the actions should be abandoned, and the premises given to C. The plaintiff in ejectment applied, with C. to be put in possession, and possession being refused, signed judgment and issued execution. The court set aside these proceedings as irregular. *Bikker v. Beeston*, 29 Law Journ. Ex. 121.

**JUDGMENT.**—*Confession—Costs upon conviction of felony—Reg.-Gen., H. T., 1853, Rules 22, 23.*—The plaintiff is entitled to sign judgment of confession upon a plea that after it commenced he was convicted of felony, and upon such judgment to have execution for his costs, by virtue of Reg.-Gen. (pleading), H. T., 1853, Rules 22, 23. *Bennett v. The London and North-Western Railway Company*, 8 Week. Rep. 500.

**SPECIAL CASE.**—*Stated by consent—15 & 16 V. c. 76, s. 46 (Common Law Procedure Act, 1852).*—Where a special case has been stated for the opinion of the court, under sec. 46 of the 15 & 16 V. c. 76, the court will not, on the application of one of the parties, amend the case to enable the party applying to raise a point which the other party refuses to consent to raise, unless the point has been omitted by error or through fraud. *Mersey Dock and Harbour Commissioners v. Jones*, 29 Law J. C. P. 239.

#### PROBATE AND DIVORCE.

**JUDICIAL SEPARATION.**—*Drunkenness.*—Drunkenness, even when accompanied by acts of considerable violence, is not a substantial ground for a decree of judicial separation. *Scott v. Scott*, 29 Law Journ. Prob. & M. 64.

**PROBATE.**—*Caveat of heir-at-law—Costs—20 & 21 V. c. 77, ss. 61, 63.*—The executors of a will affecting realty cannot be prevented from obtaining probate in common form by a caveat entered by the heir-at-law if he has not been cited. If the heir-at-law enters such a caveat it is not necessary for the executors to deliver a declaration, and if they do so, and the heir-at-law does not plead to it, he will not be condemned in the costs incurred in delivering it. *Young v. Ferrer & Others*, 29 Law Journ. Prob. & M. 69.

**WILL.**—*Costs of proof in solemn form—Executor of previous will.*—An executor of a former will has the same right as a next-of-kin to put an executor of a subsequent will upon proof in solemn form, and to interrogate his witnesses, without being liable for costs. *Boston v. Fox*, 29, Law Journ. Prob. & M. 68.

**WILL.**—*Erasure after execution—Substituted executors.*—The names of two of the executors of a duly-executed will were erased by the direction of the testator, and two other names having been substituted, the testator signed his name in the margin by the side of the alterations in the presence of one witness, who attested them. The court granted probate, with the names of the original executors. *Re Pars*, 29 Law Journ. Prob. & M. 70.

## BANKRUPTCY.

**ACT OF BANKRUPTCY.**—*Departure by trader from dwelling-house with intent to make himself bankrupt, not an act of bankruptcy*—*Jurisdiction of court to annul valid adjudication.*—The mere departure of a trader from his dwelling-house for the purpose of going to the District Court of Bankruptcy, to make himself a bankrupt, is not *per se* an act of bankruptcy; and accordingly, where after such departure, but before filing a declaration of insolvency, which was the act of bankruptcy, the property was swept away by seizure under a *fi. fa.* and a bill of sale, the court refused to annul the adjudication, or to suspend it upon the application of a creditor to enable him to present another petition founded upon the departure from the dwelling-house as an act of bankruptcy, and so to impeach the bill of sale. *Semble*, the Court of Bankruptcy has no power to set aside a valid adjudication without the consent of all parties. *Re Lewis*, 2 Law Tim. Rep. N. S. 611.

**ARRANGEMENTS.**—*Bankrupt Law Consolidation Act, 1849, 12 & 13 V. c. 106, ss. 211—223—1 & 2 V. c. 110, ss. 18, 19—Voluntary Arrangements with creditors under superintendence of Court of Bankruptcy—Registration of judgment—Process—Execution—Leaseholds—Novel point.*—The process from which a trader is to be protected by a protecting order made under sec. 211 of the 12 & 13 V. c. 106, is process by way of execution. The Court of Common Law will not decide on motion a novel point, where by such decision a party will be prevented from bringing a writ of error. The defendants, traders, carrying on business in co-partnership, on Dec. 19, 1850, petitioned the Court of Bankruptcy, and on the same day an order was made protecting their persons and property from all proceeds, which order, having been confirmed on March 14, was duly extended till July 15. All the requirements of the arrangement clauses having been duly observed, it was agreed that the defendants should retain possession of their property, in order to realise it, and pay their creditors by instalments a per-centage of their claims. Part of the defendants' property consisted of leasehold houses, which, since the date of the order, had been sold, but the purchase of which the purchaser refused to complete in consequence of the plaintiff having, on Jan. 2, recovered and registered judgment against the defendants in this court: Held, that such registered judgment was not "process" from which protection was to be given within the meaning of sec. 211, and that the point being new the Common Law Court would not decide it summarily by making the rule absolute, as prayed, when by so doing the defendant would be deprived of his writ of error. *Fluister v. M'Lennan and another*, 29 Law J. C. P. 237; 8 Week. Rep. 497.

**JOINT-STOCK COMPANY.**—*Two petitions—Practice.*—When two petitions to wind up a company are presented the same day, and within half an hour of each other, and the first petition is objected to as being informal and insufficient to support a winding-up order, but the second

petition is admitted to be regular, and it is also conceded on all hands that the company is unable to pay its debts as alleged in both petitions, the court will not dismiss the first petition, but will make an order upon both petitions to wind up the company. *Re Taylor*, 2 Law Tim. Rep. N. S. 610.

**MORTGAGE, TRANSFER OF.**—*Equitable deposit of mortgage security*—Sect. 125—*close in action, not goods and chattels within*—*Order and disposition*.—The transfer of a mortgage security passes also the mortgage debt. They cannot be separated. The transfer of a chose in action (as the transfer of a mortgage debt) by the mortgagee, by way of deposit of securities, is a simple mortgage, and it is not necessary that notice of such deposit should be given to the original debtor by the transferee. W., the original debtor, assigned to B. by way of mortgage; B. deposited the security with C., but no notice of such security was given to W.: Held, on the bankruptcy of B., that the mortgage debt was not "goods and chattels" within the meaning of the 125th section of the Bankrupt Law Consolidation Act, 1849, and that, under the circumstances, it was not in the order and disposition of the bankrupt at the time of the bankruptcy. Query, whether *Ex parte Newton* (4 D. & Ch. 138) may be considered as overruled by the decision of the Lords Justices in *Bartlett v. Bartlett* (1 De G. & J. 127)?—*Ex parte Wormald & Another Re Buller*, 2 Law Tim. Rep. N. S. 544.

**PROOF.**—*Statute of limitations*—*What sufficient acknowledgment to take case out of*.—Where there is an absolute and unconditional acknowledgment of an existing debt, a promise to pay it will be inferred, so as to take it out of the statute of limitations. An account made out by the party chargeable or his agent, but not signed by either, and rendered to the party seeking to enforce the charge by the party chargeable, wherein he debits himself with the amount charged, is a sufficient acknowledgment of the debt to take it out of the statute of limitations. *Bagshaw v. Bagshaw*, 2 Law Tim. Rep. N. S. 266.

#### CRIMINAL LAW.

**APPEAL.**—*Costs*—*Order upon informant for the costs, though not a party*—13 & 14 V. c. 45, s. 5.—By the 12 & 13 V. c. 45, s. 5, the quarter sessions may, upon an appeal, order and direct the party or parties against whom the same shall be decided, to pay to the other party or parties such costs and charges as may to such court appear just and reasonable: Held, that under this provision, the sessions, upon quashing a conviction, may order the informant to pay costs, notwithstanding he is not nominally a party to the appeal, the nominal parties being the convicting justices. *Reg. v. Smith*, 2 Law Tim. Rep. N. S. 437.

**CRUELTY TO ANIMALS.**—12 & 13 V. c. 92, s. 3—*Cock-fighting*.—The 3rd sect. of the 12 & 13 V. c. 92, being an act for the more effectual prevention of cruelty to animals, enacts, that every person who shall keep, or use, or act in the management of any place, for the purpose of fighting or baiting any bull, cock, &c., shall be liable to a penalty; and also every person who shall in any manner encourage, aid, or assist at the fighting or

baiting of any bull, cock, &c., as aforesaid, shall likewise be liable to a penalty: Held, that the encouraging, aiding, and assisting, must be in a place kept or used for the purpose of fighting or baiting any bull, cock, &c., as mentioned in the earlier part of the section. *Clark, Appellant, v. Hague*, Respondent, 8 Week. Rep. 363.

INNKEEPER.—*Gaming*—9 G. 4, c. 61.—An innkeeper who permits gaming in his house under any circumstances whatsoever, however innocent, is liable to be convicted for an offence against the tenor of his licence. *Patten v. Rhymor*, 8 Week. Rep. Ch. 496.

POOR.—*Justices of the peace—Election of overseers—Nomination by vestry*—43 Eliz. c. 1, s. 1.—The justices of the peace have authority under 43 Eliz. c. 1, s. 1, independently of the nomination of the vestry, to appoint substantial householders as overseers of the poor. *Reg. v. The Justices of Lancashire*, 8 Week. Rep. 588.

POOR-RATE.—*Precise demand—Fraction of a farthing*.—The following decision is not less curious than important. If the amount of the proportion of a poor-rate which a rate-payer has to pay comes to a certain sum, and the fraction of a farthing, he is not bound to pay the fraction, and a demand of the overseer of the sum and a farthing, is bad. *Morton v. Bramner*, 2 Law Tim. Rep. N. S. 600.

QUO WARRANTO.—*Change of venue—Writ of error*.—There is a difference between the old writ of quo warranto, and one in the nature of a quo warranto being an information in the Queen's Bench of a particular species. The Court of Queen's Bench has power to change the venue of an information in the nature of a quo warranto, and where, after the trial of such an information, it appeared, from a suggestion upon the record, that the venue had been changed, upon the ground that the trial might be more conveniently had in another county than where originally laid, it was held that there was no error. *Reg. v. Clerk*, 8 W. R. 549.

## Answers to Moot Points.

### 34.—*Apprenticeship—Wages (ante, p. 112).*

The contract of apprenticeship is regarded as for the benefit of the infant, and in *Reg. v. Lord*, 12 Q. B. 757, where an infant had bound himself to serve during a certain time for wages, but enabling the master to stop whenever he chose and retain the wages during the stoppage, the contract was held to be void, as not being beneficial to the infant.

Acting on the principle laid down in this case, I am of opinion that the apprentice would be entitled to have his wages raised at the expiration of one year from the date of his apprenticeship indenture.—J. H.

## ADDRESS TO OUR READERS.

Some who peruse this address are aware that this publication, under its present and previous titles, has now been in existence for upwards of sixteen years, and they doubtless have not failed to notice that many alterations have been made from time to time in its form as well as title. For the information of those who may not be aware of these facts, it may be stated that in its earliest and most prosperous days the publication was known as the "Law Students' Magazine" simply, and that the form in which it appeared during the greater portion of the time was an octavo (the present size), containing sixty-four pages of matter, having no cover, and at the same price as at present. It was during this period that the publication was a profitable one, and gave greatest satisfaction. Unfortunately, being under a misapprehension occasioned by not knowing the exact state of the publication, an alteration was made both in the title and size: the title was changed to "The Law Chronicle," and the size became a quarto. The supporters of the publication appear to have been dissatisfied with the change so far as regards the size, the octavo or book size being considered more convenient. In consequence of this, a return was, after some considerable time, made to the octavo size; but this, instead of being, as anticipated, an advantage in a pecuniary sense, was, though quite unknown to us, made the occasion of greatly increasing the expenses without any corresponding advantage to purchasers. On this point, however, we can say no more, as it has given rise to no little unpleasantness and promises to do so to a yet greater extent; and we have in remembrance the maxim which points out the policy, if not the propriety, of washing dirty linen "*en famille*." Still this much we are obliged to say, by way of justifying what has been not unnaturally the subject of remark—namely, the late alteration reducing the size of the publication. This arose from its being intimated, at the time the reduction was made, that the expenses exceeded the receipts, in consequence, as it was pretended, of the superior way in which the mechanical portion of the work was done, and which, it seems to have been assumed, was a sufficient compensation for the losses arising by reason of a paying publication being reduced to such an unfortunate condition as to be a burthen. This alteration, indeed, was made in a manner equally unexpected and injurious; but we must now say no more on this sore point. These retrospective remarks must suffice for the present: hereafter the extraordinary circumstances may be laid before the reader, when we cannot doubt we shall have the sympathy of every one. We can readily believe that the reader is now more anxious to hear about the future than the past, and therefore we proceed to remark that some change is necessary with a view to diminish the expenses, and we are happy to say that this can be done by simply restoring the publication to its original form, as was intended two years ago. It may be, indeed, that it will not look so glossy and neat as at

present (though as to this there is room for much doubt), but these are quite secondary matters; the important point is, that we shall thereby be enabled to give the old quantity of sixty-four pages, or four sheets, and so satisfy every one in that respect.

But this alteration alone will not suffice: it is necessary to make another, which, however, will, no more than the other, affect purchasers. We may preface this proposition with an explanation which will make the meaning and effect clear to all. At present, as from the commencement of the publication, the purchasers consist of two classes: the first being what are, strictly speaking, termed "Subscribers," inasmuch as they order the publication direct from the proprietors, who forward the same through the post, and these parties do not pay for each number, but annually (or, at least, ought to do so). The other class of purchasers are those who take the publication through booksellers, and then the sale is said to be "over the counter," and the money is paid to the publisher. We suppose most readers are aware that in this latter case a large allowance is made to the booksellers, which, with the publisher's commission and other charges, makes a very considerable deduction from the amount which otherwise would be coming to the proprietors. It is to this that we wish to direct attention, and to make an alteration. Formerly when postage was so high, and the stamp on papers so large, there was some reason for employing publishers and making an allowance to booksellers; but now that postage is a nominal sum, and there is no stamp duty, there is no necessity for having recourse to this clumsy and expensive process—for not only is it costly, but it is a real impediment to the circulation of the publication. It is well known that other legal publications dispense with this process, and we see no reason why we should be the exception. We know how unwilling some are to adopt, or adapt themselves to, changes; and we should not have recourse to the present one if it were not indispensable for our continued existence, for, unless purchasers will adopt this plan, we are not willing to continue the publication. All that they will have to do will be to send a letter in words like the following:—"Send me the 'Law Chronicle,' from January next, and until countermanded, through the post,"—adding the name and address, and repeating such name and address legibly so that there may be no mistake; and addressing the letter thus: "Law Chronicle, No. 10, Offord-road, Barnsbury, N." Thus every purchaser will become for the future a real subscriber, and we shall take the profits which have hitherto been diverted into the pockets of the booksellers. There will be an advantage to subscribers in this, inasmuch as by this course they will receive the publication earlier than through the booksellers, who frequently delay fulfilling the orders given to them, and bring unmerited disgrace on the proprietors. We should think that none can object to this alteration, which, while it benefits us, will certainly not injure them. Of course, this applies only to those who have hitherto received the publication through booksellers, or other sources than the proprietors. Those whom we have hitherto

supplied need not write, though, if from any cause they should not receive their next numbers, they can write and mention the circumstance, and immediate attention will be given thereto.

There is another and a very important point to be mentioned—and that is, as to *payment of subscriptions*. And, first, as to *arrears*. In consequence of the state in which our accounts have been placed, we find there is an extraordinary amount of arrears, which we can no longer permit to remain unpaid; so that it must be fully understood that it is a part of our plan to have the arrears cleared up to the end of the current volume, and we trust that no one will fail to comply with this request. It never was intended that credit should be given at all, much less for the lengthened period which so many have taken. With respect to the future subscriptions, we propose that payments should, as a rule, be made either for a half-year (10s.), or for a year (£1), as may best suit subscribers, though we should not object to quarterly (5s.) payments. But it must be understood that *pre-payment* will be acceptable; and that, if we are to give credit, it cannot be for more than a year's subscription, and that then an increased charge of 1s. for each half-year will be required to be paid. We trust subscribers will make up their minds to prepay. The remittance may be by penny postage stamps or by post-office orders, payable at the Chancery-lane post-office, to JOHN LANE (No. 10, Offord-road, Barnsbury, N.), and the letter be addressed simply, "Law Chronicle, No. 10, Offord-road, Barnsbury, N.," without any reference to the name of John Lane, which will prevent any use being made of the post-office orders in case the letters should fall into improper hands.

With respect to the contents of the publication, we confess that there has been some just cause of complaint, more especially in reference to the "Law Dictionary." This portion of the work was commenced about two years ago, and at present it has gone on up to the word "Decree" only. The late alteration made it necessary to elect between this and the "Law Studies" and "Maxims," and, acting on our judgment, we thought it preferable to go on with the latter; and we are happy to say, as to one of them—the "Maxims"—next number will be a completion, and then we think our readers will be satisfied that we have done well, for nothing of the sort can be elsewhere obtained. As to the "Studies," another volume will, we expect, complete them, and that will be an extremely useful and interesting production. As to the "Dictionary," we propose, with the New-year and volume, to continue it regularly until completion, giving at least sixteen pages per number, by which means we hope to finish it within a year, especially if we can, as we shall try to do, occasionally give an extra quantity. The other contents of the publication will be the same as heretofore, except that we have in view the commencement of a new subject, being "Confirmed Cases"—that is, decisions which have been recognised in subsequent decisions, and acted on by the judges. This would form a very useful work for both students and practitioners, more especially as it is, at first, intended to be confined to the more modern and important deci-



sions. We shall not, however, be able to make much progress with this division of the work until either the "Law Studies" or the "Law Dictionary" is completed.

On the whole we feel no doubt that our subscribers will find the publication much improved, as we shall bring more industry and energy to the task when we find that there is a pretty good certainty of our being paid for our labours, not by making an increased demand on purchasers, but simply by our receiving what has hitherto been diverted from us in favour of those who have done nothing to deserve it, and we see no reason to doubt that the former golden days will return, and this publication exist in the future as long as it has done in the past. The very fact that it has survived all the changes and neglects of past time gives assurance that it meets a necessity, and so long as that is the case there can be no doubt of its receiving support.

In conclusion, it may be added that this publication has, from its commencement, been under the same principal editor and proprietor—as, indeed, is known to some of the subscribers, who, having found it beneficial during their clerkship, have testified their approbation in the most effectual way—namely, by continuing to be subscribers; and some of them have not confined themselves to that, but have extended their kindness so far as to become clients of the Editor in his professional capacity of Conveyancing and Equity Counsel. This we mention because many new subscribers appear to be anxious, out of mere curiosity, to know who is the Editor, and whether he is or not a Barrister-at-Law, which information we have invariably refused to supply, though from those who have long been subscribers, and are not actuated by mere curiosity, we have never concealed these matters, and no little of the pleasure we have felt in conducting this periodical has arisen from the communications which have passed between us and those who have been pleased to attribute their professional success to our exertions and advice tendered when of most service. Indeed, we can assure our readers, that, divested entirely of the pleasure arising from these connections, we would not continue the publication; but the truth is that we have a pleasure in the retrospection, and are unwilling to do any act which might sever the old, or prevent the formation of future, relations of the nature to which reference has been made.

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It is to be understood that, from the beginning of the New-year and volume, no publisher, bookseller, or dealer can procure this publication: the only mode in which that can be done by persons not being already subscribers is by letter addressed simply "Law Chronicle, No. 10, Offord-road, Barnsbury, N.;" all remittances are to be sent by letter, and are to be made by means of penny postage stamps or post-office orders, payable at the Chancery-lane post-office to John Lane (whose address, as required by the Post-office, is No. 10, Offord-road, Barnsbury, N."), but no mention should be made, either inside or on the address, of that name, as it will be understood by us that the order is made payable to that name, and there

will thus be no risk of a stranger obtaining payment. It is also to be understood, as a necessary part of the alteration, that no *personal* application can be attended to, but application must be made by *letter*, addressed "Law Chronicle" (*ut suprâ*), and which will receive immediate attention.

Should any persons not obtain or receive the next or any subsequent numbers, they should immediately write (addressed, "Law Chronicle, No. 10, Offord-road, Barnsbury, N."), and the matter will be attended to forthwith.

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## RECENT STATUTES.

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### 23 & 24 VIC. CAP. 38.—LAW OF PROPERTY.

This is an act to amend the well-known act of Lord St. Leonards', the 22 & 23 Vic. c. 35, of which a full statement is given in vol. 1, pp. 321—333, and where a reference should be made to the statute about to be noticed. It will require more space than we can here give in order to enter into a full explanation of the provisions of the new act, and we must therefore wait for opportunity. At present we may state that in respect of judgments and crown debts as to purchasers and mortgagees, freehold, copyhold, and customary estates are placed on the same footing with leasehold estates, and all writs of execution are to be registered. No judgment is to be entered up after the passing of the act, nor any writ of execution to affect any land, of whatever tenure, as to a *bonâ fide* purchaser or mortgagee, although execution or other process be issued and be duly registered, unless such execution be executed and put in force three calendar months from the time when it was registered. There is a provision for the protection of heirs and executors against unregistered judgments. In the construction of the term "judgment," decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment are included. Under the 22 & 23 Vic. c. 35, a trustee, executor, or administrator may apply for the opinion, advice, or direction of the Court of Chancery, and it is now enacted that the petition or statement must be signed by counsel, and the judge by whom it is answered may require the petitioner or applicant to attend him by counsel either in chambers or in court, when he deems it necessary to have the assistance of counsel. The Lord Chancellors of England and Ireland are empowered to make general orders as to the investment of cash under the control of the court. The order to take account of debts, &c., of a deceased person may be made immediately after probate is granted. The act is not to extend to Scotland, and only a part to Ireland. The following are the provisions of the new act in *extenso* :—

SEC. 1. *Writs of execution of judgments to be registered.*—Whereas it is desirable to place freehold, copyhold, and customary estates on the same footing with leasehold estates, in respect of judgments, statutes, and

recognisances as against purchasers and mortgagees, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold, or customary or leasehold, to ascertain when execution has issued on any judgment, statute, or recognisance, and to protect them against delay in the execution of the writ: be it therefore enacted, that no judgment, statute, or recognisance to be entered up after the passing of this act shall affect any land (of whatever tenure) as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee have notice or not of any such judgment, statute, or recognisance), unless a writ or other due process of execution of such judgment, statute, or recognisance shall have been issued and registered as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: provided always that no judgment, statute, or recognisance to be entered up after the passing of this act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure as to a *bonâ fide* purchaser or mortgagee, although execution or other process shall have issued thereon, and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered.

SEC. 2. *Mode of registering.*—The registry heretofore required of any writ of execution, or other due process on any judgment, statute, or recognisance, in order to bind a purchaser or mortgagee, shall be made by a memorandum or minute referring to the judgment, statute, or recognisance already registered, so as to connect the registry of the writ of execution or other process therewith; such memorandum or minute to be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars in a book in alphabetical order by the name of the person in whose behalf the judgment, statute, or recognisance upon which the writ of execution or other process issued was registered, and also the year and the day of the month when every such memorandum or minute is left with him, and such officer shall be entitled for any such registry to the sum of five shillings; and all persons shall be at liberty to search the same book, in addition to all the other books in the same office, on payment of the sum of one shilling only: and all the provisions in this act in regard to writs of execution or other process and the registry thereof, or otherwise relating thereto, shall extend, *mutatis mutandis*, to writs of execution or other due process issuing on judgments of the several Courts of Common Pleas of the county palatine of Lancaster, and of pleas of the county palatine of Durham: but none of these provisions are to extend to Ireland.

SEC. 3. *Provision for protection of heirs and executors against unregistered judgments.*—And whereas by an act passed in the fourth and fifth years of their late Majesties King William and Queen Mary, intituled "An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas, and Exchequer at Westminster," it was enacted, that no judg-

ment not docketed and entered in books in the manner thereby provided should affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators in their administration of their ancestors, testators, or intestates estates: and whereas by several later acts judgments are required to be registered with more particulars than were required by the said recited act; and it is thereby enacted that judgments not so registered shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors unless and until the same shall be registered in manner thereby required; and in obedience to a direction in one of the same acts contained the dockets existing under the said first recited act have been finally closed: and whereas the said several later acts do not expressly enact that judgments not docketed as thereby required shall not have any preference against heirs, executors, or administrators in their administration of their ancestors, testators, or intestates estates, in consequence whereof such heirs, executors, or administrators have been held to have lost the protection which they enjoyed under the said first-recited act, and it is expedient that the same should be restored: be it therefore declared and enacted, that no judgment which has not already been or which shall not hereafter be entered or docketed under the several acts now in force, and which passed subsequently to the said act of the fourth and fifth years of King William and Queen Mary, so as to bind lands, tenements, or hereditaments as against purchasers, mortgagees, or creditors, shall have any preference against heirs, executors, or administrators in their administration of their ancestors, testators, or intestates estates.

**SEC. 4. *Judgments as against heirs and executors to be re-registered.***—No judgments which since the passing of an act of the first and second years of her Majesty Queen Victoria, intituled “An Act for abolishing Arrest on Mesne Process in Civil Actions except in certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England” (being one of the acts hereinbefore referred to), have been registered under the provisions therein contained, or contained in the later act of the 2 & 3 Vic. c. 11, as explained and amended by the 18 & 19 Vic. c. 15 (being two other of the acts hereinbefore referred to), or which shall hereafter be so registered, shall have any preference against heirs, executors, or administrators in their administration of their executors, testators, or intestates estates, unless at the death of the testator or intestate five years shall not have elapsed from the date of the entry thereof on the docket or from the only or last re-registry thereof, as the case may be, which re-registry from time to time is hereby authorised to be made in manner directed by the said act of the 2 & 3 Vic., as explained and amended by the 18 & 19 Vic.; but it shall be deemed sufficient to secure such preference as aforesaid, if such a memorandum as was required in the first instance is again left with the senior master of the Common Pleas within five years before the death of the testator or intestate, although more than five years shall have expired

by effluxion of time since the last previous registration, before such last-mentioned memorandum or minute was left; and so toties quoties upon every re-registry.

**SEC. 5. *Extent of the word "judgment."***—In the construction of the previous provisions the term judgment shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment.

**SEC. 6. *Restriction of effect of waiver.***—Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

**SEC. 7. *Provision for cases of future and contingent uses.***—Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses, and the continued existence in him or elsewhere of any seisin to uses or scintilla juris shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or scintilla juris be deemed to be suspended, or to remain or to subsist in him or elsewhere.

**SEC. 8. *Sec. 24 of 22 & 23 Vic. c. 35, extended to mortgagees.***—Sec. 24 of the 22 & 23 Vic. c. 35, shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in the said section.

**SEC. 9. *Form of applying for advice of judge, &c., under sec. 30 of 22 & 23 Vic. c. 35.***—Where any trustee, executor, or administrator shall apply for the opinion, advice, or direction of a judge of the Court of Chancery under the 30th section of the 22 & 23 Vic. c. 35, the petition or statement shall be signed by counsel, and the judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel either in chambers or in court, where he deems it necessary to have the assistance of counsel.

**SEC. 10. *Power to Lord Chancellors, &c., of England and Ireland to make general orders as to investment of cash under the control of the court.***—It shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal of England, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the vice-chancellors of the said court, or any three of them, and for the Lord Chancellor of Ireland, with the advice and assistance of the Lords Justices of Appeal and the Master of the Rolls in Ireland, to

make such general orders from time to time as to the investment of cash under the control of the court, either in the Three per Cent. Consolidated or Reduced or New Bank Annuities, or in such other stocks, funds, or securities as he or they shall, with such advice or assistance, see fit; and it shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners in England, and for the Lord Chancellor in Ireland, to make such orders as he or they shall deem proper for the conversion of any Three per Cent. Bank Annuities now standing, or which may hereafter stand in the name of the accountant-general of the said Court of Chancery, in trust in any cause or matter, into any such other stocks, funds, or securities upon which, by any such general order as aforesaid, cash under the control of the court may be invested; all orders for such conversion of bank annuities into other funds or securities to be made upon petition to be presented by any of the parties interested in a summary way, and such parties shall be served with notice thereof as the court shall direct.

SEC. 11. *Trustees, &c., to invest trust funds in the stocks, &c., in which cash under the control of the court may be invested.*—When any such general order as aforesaid shall have been made, it shall be lawful for trustees, executors, or administrators, having power to invest their trust funds upon Government securities, or upon parliamentary stocks, funds, or securities, or any of them, to invest such trust funds or any part thereof, in any of the stocks, funds, or securities, in or upon which by such general order cash under the control of the court may from time to time be invested.

SEC. 12. *Clause 82 of 22 & 23 Vic. c. 35, to act retrospectively.*—Clause 82 of the 22 & 23 Vic. c. 35, shall operate retrospectively.

SEC. 13. *Extension of sec. 40 of 3 & 4 Will. 4, c. 27, s. 40, to cases of claims to estates of intestates.*—Whereas by the 3 & 4 Will. 4, c. 27, s. 40, it was enacted, that after the 31st Dec., 1833, no action or suit or other proceeding should be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise, charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same should have accrued to some person capable of giving a discharge for or release of the same, unless such acknowledgment in writing or payment of principal or interest as therein mentioned should have been given or made, and then within twenty years next after such payment or acknowledgment, or the last of such payments or acknowledgments: And whereas it is expedient that the said enactment should be extended to the case of claims to the estates of persons dying intestate: be it therefore enacted, that after the 31st Dec., 1860, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of

the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given.

14. *Order to take account of debts, &c., of deceased person under sec. 19 of 13 & 14 Vic. c. 35, may be made immediately after probate granted.*—The order to take an account of the debts and liabilities affecting the personal estate of a deceased person, pursuant to sec. 19 of the 13 & 14 Vic. c. 35, may be made immediately, or at any time after probate or letters of administration shall have been granted; and such order may be made either by the Court of Chancery upon motion or petition of course, or by a judge of the said court, sitting at chambers, upon a summons in the form used for originating proceedings at chambers; and after any such order shall have been made, the said court or judge may, on the application of the executors or administrators, by motion or summons, restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having, or claiming to have, any demand upon the estate of the deceased, by reason of any debt or liability due from the estate of the deceased, upon such notice and terms and conditions (if any) as to the said court or judge shall seem just; and the judge, in taking an account of debts and liabilities pursuant to any such order, shall, on the application of the executors or administrators, be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuance to any such order shall be certified by his chief clerk, without any adjudication thereon; and any notices for creditors to come in which may be published in pursuance of any such order, shall have the same force and effect as if such notices had been given by the executors or administrators, in pursuance of sec. 29 of the 22 & 23 Vic. c. 35.

SEC. 15. *Act not to extend to Scotland, &c.*—This act is not to extend to Scotland, nor any of the clauses, except clause 6 and the subsequent clauses, to extend to Ireland.

#### 23 & 24 VIC. C. 75.—CRIMINAL LUNATIC ASYLUM.

This is an act to make better provision for the custody and care of criminal lunatics, and it recites that by the 39 and 40 G. 3, c. 94, the 3 & 4 V. c. 54, the 5 & 6 V. c. 29, and the 6 & 7 V. c. 26, her Majesty is empowered, where any person is charged with any such offence as therein mentioned, and acquitted on account of insanity, and where any person is indicted for any offence and upon an arraignment is found insane, to give order for the safe custody of such person during her pleasure, in such place and in such manner as she may think fit; and one of her Majesty's principal Secretaries of State is empowered, upon such certificate as therein mentioned of the insanity of any person imprisoned as therein mentioned, to direct such person to be removed to such county lunatic asylum, or other proper receptacle for insane persons as the said Secretary of State may judge

proper and appoint: and that the said Secretary of State is empowered to order any convict in Pentonville or Millbank prison becoming or found insane during confinement to be removed to such lunatic asylum as the said Secretary of State may think proper: and that it is expedient that provision should be made for the custody and care of criminal lunatics in an asylum or asylums appropriated to that purpose. There are then various provisions made of which the following are the principal:—

SEC. 1. *Her Majesty may appoint asylum for criminal lunatics.*—It shall be lawful for her Majesty from time to time, by warrant under her royal sign manual, to appoint that any asylum or place in England which her Majesty may have caused to be provided or appropriated, and may deem suitable for this purpose, shall be an asylum for criminal lunatics, and the provisions of this act shall be applicable to every such asylum.

SEC. 2. *Secretary of State may direct criminal lunatics to be confined in the asylum.*—It shall be lawful for one of her Majesty's principal Secretaries of State, by warrant under his hand, to direct to be conveyed to and kept in any such asylum any person for whose safe custody during her pleasure her Majesty is authorised to give order, or whom such Secretary of State might direct to be removed to a lunatic asylum under any of the acts hereinbefore mentioned, or under any other act of Parliament, or any person sentenced or ordered to be kept in penal servitude, who may be shown to the satisfaction of the Secretary of State to be insane, or to be unfit from imbecility of mind for penal discipline; and the Secretary of State may direct to be removed to and kept in such asylum any such persons as aforesaid, who, under any previous order of her Majesty or warrant of the Secretary of State, may have been placed and remain in any county lunatic asylum, or other place of reception for lunatics, and every person directed by the Secretary of State to be conveyed or removed to and kept in an asylum under this act, shall be conveyed to such asylum accordingly, and shall be kept therein until lawfully removed or discharged, and that with every person so conveyed or removed there shall be transmitted a certificate, as set forth in Schedule A. to this act annexed, duly filled up and authenticated, the contents of which certificate shall be transcribed into the general register to be kept in every such asylum.

SEC. 3. *Nothing to affect the authority of the Crown to make other provision for the custody of a criminal lunatic.*—Nothing in this act shall restrain or affect the authority of her Majesty, where she may so think fit, to give such other order for the safe custody of any such person as aforesaid as she might have given if this act had not been passed, or restrain or affect the authority of the Secretary of State, to continue in or direct to be removed to any county asylum or other place for the reception of lunatics any of the persons aforesaid whom he might have so continued or directed to be removed if this act had not been passed.

23 & 24 VIC. C. 77.—NUISANCES REMOVAL AND DISEASES PREVENTION.

This statute amends the 18 & 19 Vic. cc. 121 & 116, the provisions of



the first of which acts are stated in 2 L. C. 84, 85, and the following enactments, which are all that we can find room for, should be noted.

With respect to nuisances removal, the new act contains the following provisions :—

**SEC. 1.** *Secs. 3, 6, 7, and 9 of 18 & 19 Vic. c. 121 repealed.*—Secs. 3, 6, 7, and 9 of the said “Nuisances Removal Act for England, 1855,” shall be repealed: provided always, that such repeal as aforesaid shall not extend to any charges or expenses already incurred, but the same may be defrayed and recovered, and all proceedings commenced or taken under the said act and not yet completed, may be proceeded with, and all contracts under the said act shall continue and be as effectual, as if this act had not been passed.

**SEC. 2.** *Local authority to execute the Nuisances Removal Act.*—The following bodies shall respectively be the local authority to execute the said Nuisances Removal Act in the districts hereunder stated in England :

In any place within which the Public Health Act is or shall be in force, the local board of health :

In any other place wherein a council exists or shall exist, the mayor, aldermen, and burgesses by the council, except in the city of London and the liberties thereof, where the local authority shall be the Commissioners of Sewers for the time being, and except in the city of Oxford and borough of Cambridge, where the local authority shall be the commissioners acting in execution of the local improvement acts in force respectively in the said city and borough :

In any place in which there is no local board of health or council, and where there are or shall be trustees or commissioners under an improvement act, such trustees or commissioners :

In any place within which there is no such local board of health, council, body of trustees, or commissioners, if there be a board of guardians of the poor for such place, or for any parish or union within which such place is situate, such board of guardians, and, if there be no such board of guardians, the overseers of the poor for such place, or for the parish of which such place forms part.

**SEC. 3.** *Highway board or nuisances removal committees now subsisting may be continued so long as they employ sanitary inspectors.*—Provided, that in any place where a highway board or “the nuisances removal committee” chosen by the vestry in pursuance of the said act is subsisting, and at the time of the passing of this act employs or joins with other local authorities in employing a sanitary inspector or inspectors, such highway board or nuisances removal committee may continue to act, and a like committee may be annually chosen by the vestry for such place in the same manner as if this act had not been passed; but in case in any year the nuisances removal committee be not chosen for such place in manner provided by the said act, or if the highway board or committee now subsisting or hereafter chosen fail for two months, in any year to appoint or employ a sanitary inspector or inspectors, the authority of such highway board or committee

shall cease, and no like committee shall be chosen for such place, and the same body or persons shall thenceforth be the local authority for the place as if no such highway board or committee had been appointed therein.

As to *diseases prevention* the new act provides :—

SEC. 10. *Secs. 2 & 3 of 18 & 19 Vic. c. 116, repealed.*—Secs. 2 & 3 of “The Diseases Prevention Act, 1855,” and every other enactment constituting a local authority for the execution of the same act, or providing for the expenses of the execution thereof, except those contained in the 18 & 19 Vic. c. 120, the Metropolis Local Management Act, shall be repealed.

SEC. 11. *Guardians and overseers of the poor to be the local authorities for executing Diseases Prevention Act.*—The board of guardians for every union, or parish not within a union, in England shall be the local authority for executing the said Diseases Prevention Act in every place within their respective unions and parishes, and in every parish and place in England not within a union, and for which there is no board of guardians, the overseers of the poor shall be the local authority to execute the same act; and the expenses incurred in the execution of such act by the board of guardians for a union shall be defrayed out of the common fund thereof, and the expenses of the board of guardians or overseers of the poor of any single parish or place shall be defrayed out of the rates for the relief of the poor of such parish or place; provided that every such board of guardians shall, for the execution of the said act for the prevention of diseases, have the like powers of appointing committees, with the like authority, and where any such committee is appointed the expenses thereof and of the board shall be paid in the same manner as hereinbefore provided, where such a board is the local authority for the execution of the said Nuisances Removal Act; provided also, that any expenses already incurred by any local authority in the execution of the said act shall be defrayed as if this act had not been passed; provided, moreover, that in respect of any place where, under this act, the local authority for executing the Nuisances Removal Act is any other body than the board of guardians or the overseers of the poor, the privy council, if it see fit, may, in the manner provided for the exercise of its powers under the Public Health Act, 1858, authorise such other body to be, instead of the board of guardians or the overseers of the poor, the local authority for executing the Diseases Prevention Act; provided also, that as regards the metropolis the vestries and district boards under the act 18 & 19 Vic. c. 120, within their respective parishes and districts, shall continue to be the local authorities for the execution of the said “Diseases Prevention Act, 1855,” and their charges and expenses shall be defrayed as if this act had not been passed.

#### 23 & 24 VIC. C. 84.—ADULTERATION OF FOOD OR DRINK.

This is an act for the repression (if possible) of adulteration in articles of food or drink.

SEC. 1. *Penalty on persons selling articles of food or drink knowing the same to be injurious to health—As to subsequent offences.*—Every person who

shall sell any article of food or drink with which, to the knowledge of such person, any ingredient or material injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell as pure or unadulterated any article of food or drink which is adulterated or not pure, shall for every such offence, on a summary conviction of the same before two justices of the peace at petty sessions in England, and in Scotland before two justices of the peace in justice of the peace court, or before the sheriff substitute of the county, or before justices at petty sessions or a divisional justice in Ireland, forfeit and pay a penalty not exceeding five pounds together with such costs attending such conviction as to the said justices shall seem reasonable; and if any person so convicted shall afterwards commit the like offence, it shall be lawful for such justices to cause such offender's name, place of abode, and offence to be published, at the expense of such offender, in such newspaper or in such other manner as to such justices shall seem desirable.

SEC. 3. *Power to appoint analysts.*—In the city of London and the liberties thereof the Commissioners of Sewers of the city of London and the liberties thereof, and in all other parts of the metropolis the vestries and district boards acting in execution of the act for the better local management of the metropolis in England and Ireland, the court of quarter sessions of every county, and the town council of every borough having a separate court of quarter sessions, and in Scotland the commissioners of supply at their ordinary meetings for counties, and town councils within their several jurisdictions, may, from time to time for their respective city, districts, counties, or boroughs, appoint and remove one or more persons possessing competent medical, chemical, and microscopical knowledge as analysts of all articles of food or drink purchased within the said city, metropolitan districts, counties, or boroughs, and may pay to such analysts such salary or allowances as they may think fit; but such appointments and removals shall at all times be subject in Great Britain to the approval of one of her Majesty's principal Secretaries of State, and in Ireland to that of the Lord-Lieutenant.

There are powers for purchasers and also justices to have articles of food analysed. An appeal is given to the quarter sessions against any conviction.

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## Moot Points.

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### No. 51.—Administration.

The dividends of a sum of stock were given to A. for life, and after her decease the principal to her children equally. In A.'s lifetime, a child died under twenty-one; three children survived A. Payment is about to be

made, and administration has been taken out to the deceased child, but the executors also require administration to his deceased mother. Can this be insisted on?  
W. H. S.

No. 52.—*Vesting.*

A testator gave his real estate to X. and his heirs, beneficially charged with the payment of £5,000. to A. and his children after his death, as thereafter mentioned. After directing the £5,000 to be invested by X., and the dividends paid to A. for life, the testator directed that X. should pay and apply the £5,000 equally amongst the children of A., as and when they respectively should attain the age of twenty-one, with interest for the same in the meantime for their benefit; if only one child, the whole sum to such child; but if A. should have no child living at his decease, the £5,000 were given over to strangers. A. left him surviving two children who had attained twenty-one; one of his children had died in A.'s lifetime under twenty-one, leaving a wife and children. Are the representatives of the deceased son entitled to a share of the £5,000, or are the two surviving sons alone entitled to the money?  
M. J. N.

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## Answers to Moot Points.

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No. 46.—*Legacy Duty (ante, p. 131).*

A. B., though the husband of the daughter, is a stranger in blood to the testator, but nevertheless is only liable to pay a duty of £1 per cent. on his legacy under the Legacy Duty Act, 16 & 17 V. c. 51, s. 11.

No. 47.—*Mortgage—Power of Executor to advance money to Mortgagor to pay off Mortgage to himself and co-Executor (ante, p. 132).*

I think the executor, by reason of his fiduciary character, would be disqualified from advancing the money personally, and having the conditional surrender made to himself. But that disqualification might be remedied, by some other person advancing the money at the instance of the executor, and having such conditional surrender made to him, and then must be got to sign a declaration of trust, declaring that the sum advanced to the mortgagor was not, in fact, paid out of his own proper moneys, but out of moneys belonging to the executor, and that he held such security only on trust for the said executor, &c. This is a practice quite usual, where there is a doubt as to the legality of certain persons themselves advancing moneys.

No. 49.—*Power of Sale to Executors.*

There is a great distinction between simple powers, and powers in the nature of trusts. In this case, I take it, it is a power in the nature of a trust, and, consequently, is imperative on the donee of the power to execute it, whereas had it been a mere simple power, as stated in the moot point, it would not have been imperative on him, but would have been at the will of such donee of the power to execute it.

Where a power is given to trustees to sell an estate, and apply the proceeds upon certain trusts (as in the case stated by the moot point), such a power is in the nature of a trust, the legal estate until the execution of the power of course descends to the heir at law (*Warneford v. Thompson*, 3 Ves. Jun. 518, and *Hilton v. Kenworthy*, 3 East, 538); and if the power should be defeated by any means, as for instance by the death of the donee of the power before execution, the legal estate would remain in the heir at law for his own benefit; but equity, acting upon the trust, will compel the heir at law to join in the sale of the estate for the purposes designated by the testator (*Garfoot v. Garfoot*, 1 Cha. Ca. 35; *Gwilliams v. Rowell*, Hard. 204); and even on the same principle the same equity is extended, where, although in words a power is given, it never arises, because the testator has omitted to appoint some person to execute it (*Pitt v. Pelham*, 1 Cha. Ca. 136). It is also stated in the moot point, that the testator directed that his executors should stand possessed of his real and personal estate upon trust thereout to pay his debts (except the mortgage debt); and it was held, in the case of *Fowle v. Green*, 1 Cha. Ca. 262, that where lands are devised to be sold for payment of debts, the heir at law shall be compelled to join in the sale.

I think that, upon a conveyance in due course by the trustees and the mortgagee, the estate of the heir at law would be ousted, for it was decided in the case of *Warneford v. Thompson*, above cited; in which case no estate was devised to the trustees, but they had merely a power to sell; that till the execution of such power the legal estate descended to the heir at law, but as soon as the power was executed the legal estate was in the vendee. And again, the legal estate in this case would, I presume, be vested in the mortgagee under his mortgage deed, and consequently the only estate the heir at law would be entitled to at the death of the testator and before the execution of the power, would be the legal estate in the equity of redemption; and would not the legal estate, supposing the mortgage to have been made in fee, have vested in the vendee, through the concurrence of the mortgagee, who would in such a case be the only party that could convey the legal estate to a purchaser, inasmuch as it was vested in him? As to the chattel interest vested in the trustees, it would of course merge in the inheritance on the execution of the conveyance. I should like to see the opinions of other correspondents on this point.

J. W.

## RECENT STATUTES.

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### 23 & 24 VIC. CAP. 111.—STAMP DUTIES ACT.

This is a second Stamp Duty Act of the session ; the first is noticed *ante*, p. 146. It provides new duties on awards, contract notes, assignment or surrender of lease exceeding thirty-five years, and not being on a sale or mortgage, policies of assurance (not being against fire), promissory notes exceeding £4,000, and foreign notes. One provision applicable to the first act may be here noticed : it relates to stamps on agreements.

SEC. 12. *The stamp on an agreement may be adhesive.*—The stamp duty of sixpence by the act of the present session of Parliament, c. 15, charged on an agreement under hand only may be denoted by an adhesive stamp in any case where the same is capable of being used under the terms and restrictions hereinafter mentioned ; and the Commissioners of Inland Revenue shall provide stamps for the purpose ; and whenever any such adhesive stamp shall be used, every party to the agreement who shall sign the same shall also at the time of so signing write upon or across the stamp his name and the date of the day and year of writing the same, so that the stamp may be appropriated to the instrument, and effectually cancelled and rendered incapable of being used for any other : and in default thereof the stamp shall be of no avail ; and proof of the said writing upon or across the stamp, as hereby required, shall be a necessary part of the evidence of the agreement in any case where such agreement is not stamped with an impressed stamp.

### 23 & 24 VIC. CAP. 115.—CROWN DEBTS AND JUDGMENTS.

This act simplifies the entry of satisfaction or discharge on the registry of crown debts, judgments, lites pendentes, and annuities.

SEC. 1. *Provisions of Secs. 195, 196, and 197, of 16 & 17 Vic. c. 107, extended to all bonds to the Crown.*—All the powers, provisions, and regulations concerning bonds and other securities relating to the customs contained in ss. 195, 196, and 197, of 16 & 17 Vic. c. 107, shall, *mutatis mutandis*, be deemed to extend and shall be applied to all bonds and other securities entered into or given to her Majesty, her heirs or successors ; provided always, that in every case in which under the provisions of the said sections any certificate is required to be signed or any other matter authorised to be done by the Commissioners of Customs, or any number of them, any such certificate or matter in relation to any bond or other security concern-

ing or incident to any public department, shall respectively be signed and done by the respective commissioners or other principal officers of such department, or any two of them respectively, or if there shall be only one such commissioner or principal officer then by him, as the case may be, or if there shall be no such commissioner or other principal officer then by the commissioners of her Majesty's Treasury or any two of them.

SEC. 2. *As to entry of satisfaction on judgments.*—The senior master of the Court of Common Pleas at Westminster may, upon the filing with him of an acknowledgment in the form or to the effect following, be at liberty to enter a satisfaction or discharge as to any registered judgment, pending suit, lis pendens, decree, order, rule, annuity, or rent-charge or writ of execution, and such officer shall be entitled for any such registry of satisfaction or discharge to the sum of two shillings and sixpence, and no more; and such senior master may issue certificates of the entry of any satisfaction or discharge, and may charge the sum of one shilling for every such certificate.

*Form of Acknowledgment of Satisfaction.*

Satisfaction is acknowledged between A. B. and C. D.  
as to a dated the day of 18, for the sum  
of £ , a memorandum of which said was left with the senior  
master of the Court of Common Pleas at Westminster on the day of  
18, to affect the estate of and [if so] on the writ of  
execution thereon, dated the day of 18, a memorandum  
of which was left with the said master on the day of 18.  
And (or the executor or administrator of) do hereby expressly  
nominate and appoint of , attorney-at-law to witness, and  
attest the execution of this acknowledgment of satisfaction.

<p>Signed by the said in the presence of me, the undersigned , one of the attorneys of her Majesty's Court of , at Westminster, and I hereby declare myself to be the attorney for and on behalf of the said , expressly named by , and attending at request to inform him of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by ) , and I also declare that I subscribe my name as witness hereto as such attorney.</p>	}	<p>A. B. the above-named [or F. G., ex- ecutor or adminis- trator of] the day of 18 .</p>
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23 & 24 VIC. CAP. 126.—LAW AND EQUITY ACT.

This is the act (entitled "The Common Law Procedure Act, 1860") which was brought forward as a "fusion" of law and equity bill; though deprived of its chief sting, it is nevertheless an important statute, and it will be necessary that its provisions should be carefully studied. It came into operation on the 6th of October last.

SEC. 1. *Relief against forfeiture for non-payment of rent.*—In the case of

any ejectment for a forfeiture brought for non-payment of rent, the court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, up and to within the like time after execution executed, and subject to the same terms and conditions in all respects, as to payment of rent, costs, and otherwise, as in the Court of Chancery; and if the lessee, his executors, administrators, or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease.

SEC. 2. *Relief against forfeiture for non-insuring*, 22 & 23 Vic. c. 35.—In the case of any ejectment for a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, the court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, in all cases in which such relief may now be obtained in the Court of Chancery under the provisions of an act passed in the session of Parliament held in the twenty-second and twenty-third years of the present reign, intituled "An Act to further amend the Law of Property, and to relieve Trustees," and upon such terms as would be imposed in such court.

SEC. 3. *Minute of relief granted*.—Where such relief shall be granted, the court or a judge shall direct a minute thereof to be made by indorsement on the lease or otherwise.

SEC. 4. *Appeal to the court from order of judge*.—Any order made by a judge upon an application for relief under the provisions of this act shall be subject to an appeal to the court, and may be discharged, varied, or set aside by the court, upon such terms as the court shall think fit, on application made thereto by any party dissatisfied with such order.

SEC. 5. *Power to appeal from order of court*.—It shall be lawful for the party against whom the court makes any rule or order in respect of such relief to appeal from such rule or order.

SEC. 6. *Courts of error to be courts of appeal*.—The courts of error shall be courts of appeal for the purposes of this act.

SEC. 7. *Notice of appeal*.—No appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to one of the masters of the court, within four days after the decision complained of, or such further time as may be allowed by the court or a judge.

SEC. 8. *Bail*.—Notice of appeal shall be a stay of execution, provided bail to pay the sum demanded and costs be given, in like manner and to the same amount as bail in error, within eight days after the decision complained of, or before execution delivered to the sheriff.

SEC. 9. *Form of appeal*.—The appeal hereinbefore mentioned shall be upon a case to be stated by the parties (and in case of difference to be



settled by the court, or a judge of the court appealed from), in which case shall be set forth so much of the pleadings, facts, and the order, rule, or judgment objected to as may be necessary to raise the question for the decision of the Court of Appeal.

SEC. 10. *Judgment of Court of Appeal, and power to remit proceedings.*—The Court of Appeal shall give such judgment or make such rule as ought to have been given or made in the court below, and shall have power to remit the cause, with such directions as they shall think proper; and all such further proceedings may be taken thereupon as if the judgment or rule had been given or made by the court below.

SEC. 11. *Power of Court of Appeal as to costs, &c.*—The Court of Appeal shall have power to adjudge payment of costs, and to order restitution.

SEC. 12. *Interpleader may be granted, though titles have not a common origin, 1. & 2 Will. c. 58.*—Where an action has been commenced in respect of a common law claim for the recovery of money or goods, or where goods or chattels have been taken or are intended to be taken in execution under process issued from any one of the superior courts, or from the Court of Common Pleas at Lancaster, or the Court of Pleas at Durham, and the defendant in such action, or the sheriff or other officer, has applied for relief under the provisions of an act made and passed in the session of Parliament held in the first and second year of the reign of his late Majesty King William the Fourth, intituled “An Act to enable Courts of Law to give Relief against adverse Claims made upon Persons having no Interest in the Subject of such Claims,” it shall be lawful for the court or a judge to whom such application is made to exercise all the powers and authorities given to them by this act and the hereinbefore mentioned act passed in the session of Parliament held in the first and second years of the reign of his late Majesty King William the Fourth, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another.

SEC. 13. *Court or judge may direct sale of goods seized in execution.*—When goods or chattels have been seized in execution by a sheriff or the officer under process of the above-mentioned courts, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels, by way of security for a debt, the court or a judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt, or otherwise, as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such court or judge may seem just.

SEC. 14. *Power to court or judge to decide summarily in certain cases.*—Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the

court or judge, wherever, from the smallness of the amount in dispute or of the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just.

SEC. 15. *Special case may be stated where facts undisputed.*—In all cases of interpleader proceedings, where the question is one of law, and the facts are not in dispute, the judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the court.

SEC. 16. *Proceedings on special case in court below and in error.*—The proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under "The Common Law Procedure Act, 1852;" and error may be brought upon a judgment upon such case: and the provisions of "The Common Law Procedure Act, 1854," as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this act.

SEC. 17. *Judgment and decision when to be final.*—The judgment in any such action or issue as may be directed by the court or judge in any interpleader proceedings, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, and under them.

SEC. 18. *Rules, orders, &c., made in interpleader proceedings may be entered of record and made evidence.*—All rules, orders, matters, and decisions to be made and done in interpleader proceedings under this act (excepting only any affidavits) may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment in the superior courts of common law.

SEC. 19. *Joinder as plaintiffs of all persons supposed to be legally entitled.*—The joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the court to be entitled to recover: provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the court or a judge.

SEC. 20. *Defendant to have benefit of set-off, though some plaintiffs improperly joined.*—Upon the trial of such cause a defendant who has therein pleaded a set-off may obtain the benefit of his set-off by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs who establish their right to maintain the cause is or are indebted to him.

SEC. 21. *No other action for some claim to be brought.*—No other action shall be brought against the defendant by any person so joined as plaintiff in respect of the same cause of action.

SEC. 22. *Provisions of 19 & 20 Vic. c. 108, as to replevin extended to all cases of replevin.*—The provisions of an act passed in the session of Parliament held in the 19th and 20th years of the reign of her present Majesty, c. 108, which relate to replevin, shall be deemed and taken to apply to all cases of replevin in like manner as to the cases of replevin of goods distrained for rent or damage feasant.

SEC. 23. *Payment into court in replevin.*—The plaintiff in replevin may in answer to an avowry pay money into court in satisfaction, in like manner and subject to the same proceedings as to costs and otherwise as upon a payment into court by a defendant in other actions.

SEC. 24. *Effect of such payment.*—Such payment into court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond.

SEC. 25. *Payment into court in action on money bonds and for detainer.*—In any action brought upon a bond which has a condition or defeazance to make void the same upon payment of a lesser sum at a day or place certain, with a penalty, and in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff in respect of such bond in the former case, and in the latter case to the value of the goods alleged to be detained; and such payment into court shall be made and pleaded in like manner, and according to the provisions of "the Common Law Procedure Act, 1852;" and the like proceedings may be had and taken thereupon as to costs and otherwise.

SEC. 26.—*Dower, writ of right of dower, and quare impedit abolished as real actions, and to be commenced by writ of summons.*—No writ of right of dower or writ of dower unde nihil habet, and no plaint for free bench or dower in the nature of any such writ, and no quare impedit shall be brought after the commencement of this act in any court whatsoever; but where any such writ, action, or plaint would now lie, either in a superior or any other court, an action may be commenced by writ of summons issuing out of the Court of Common Pleas in the same manner and form as the writ of

summons in an ordinary action ; and upon such writ shall be indorsed a notice that the plaintiff intends to declare in dower, or for free bench, or in quare impedit, as the case may be.

SEC. 27. *Writ, and all proceedings thereupon, to be same as in ordinary actions.*—The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment, execution, and all other proceedings and costs upon such writ, shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons ; and the provisions of "the Common Law Procedure Act, 1852," and of "the Common Law Procedure Act, 1854," shall apply to the writ and pleadings, and proceedings thereupon.

SEC. 28. *Judge may refuse to interfere in proceedings to attach debts.*—In proceedings to obtain an attachment of debts under "the Common Law Procedure Act, 1854," the judge may, in his discretion, refuse to interfere, where, from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious.

SEC. 29. *Proceedings where third person has a lien on the debt.*—Whenever in proceedings to obtain an attachment of debts under the act above-mentioned, it is suggested by the garnishee that the debt sought to be attached belongs to some third person who has a lien or charge upon it, the judge may order such third person to appear before him, and state the nature and particulars of his claim upon such debt.

SEC. 30.—*Judge may bar claim of third person, and make orders.*—After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the judge may think fit to call before him, or in case of such third person not appearing before him upon such summons, the judge may order execution to issue to levy the amount due from such garnishee, or the judgment creditor to proceed against the garnishee, according to the provisions of "the Common Law Procedure Act, 1854," and he may bar the claim of such third person, or make such other order as he shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as he shall think just and reasonable.

SEC. 31.—*Provisions of 17 & 18 Vic. c. 125, to apply to orders.*—The provisions of "the Common Law Procedure Act, 1854," so far as they are applicable, shall apply to any order, and the proceedings thereon, made and taken in pursuance of the herein next before-mentioned powers under this act.

SEC. 32.—*Costs of writs of mandamus and injunction may be included in writs.*—In a cases in which a writ of mandamus or of injunction is issued under the provisions of "the Common Law Procedure Act, 1854," such writ shall, unless otherwise ordered by the court or a judge, in addition

to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving such writ ; and payment of such costs may be enforced in the same manner as costs payable under a rule of court are now by law enforceable.

SEC. 33.—*Mode of enforcing writs of injunction against corporations.*—Writs of injunction against a corporation may be enforced either by attachment against the directors or other officers thereof, as in the case of a mandamus, or by writ of sequestration against their property and effects, to be issued in such form and tested and returnable in like manner as writs of execution, and to be proceeded upon and executed in like manner as writs of sequestration issuing out of the Court of Chancery.

SEC. 34.—*Costs not recoverable in action for injury, and verdict less than £5, if judge certifies.*—When the plaintiff in any action for an alleged wrong in any of the superior courts recovers by the verdict of a jury less than five pounds, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought.

SEC. 35. *Enactment in lieu of sec. 88 of 17 & 18 V. c. 125.*—The eighty-eighth section of “the Common Law Procedure Act, 1854,” shall be and is hereby repealed ; and from and after the passing of this act the superior courts or any judge thereof may, upon summary application, by rule or order, exercise such and the like jurisdiction as may be exercised by the Court of Chancery under the provisions of the ninth part of “the Merchant Shipping Act, 1854.”

SEC. 36. *Amendments.*—It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceedings under the provisions of this act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not ; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for.

By sec. 37, *et seq.*, general rules may be made and new forms of writs, &c., be issued, and the provisions are extended to the courts of the counties palatine, and by order of council the whole or part of the act may be directed to extend to any court of record.

## Notices of New Books.

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### OKE'S MAGISTERIAL SYNOPSIS.

*The Magisterial Synopsis: a practical Guide for Magistrates, their Clerks, Attornies, and Constables, in all matters out of Quarter Sessions, Summary Convictions, and Indictable Offences, with their Penalties, Punishments, Procedure, &c., being tabularly arranged.* By GEORGE C. OKE, Assistant Clerk to the Lord Mayor of London, author of "Magisterial Formulist," "The Laws of Turnpike Roads," &c., &c. 7th Edition, enlarged and improved. 44s. London: Butterworths.

It is but a short time since we had the pleasure of noticing in these pages the 6th edition, and now to our astonishment we find ourselves called to notice another, being the 7th, edition of Mr. Oke's (truly) opus magnum. Even the most casual glance at the work will suffice to satisfy any one what a great labour the author has undertaken, and a closer examination will satisfy him how efficiently this has been performed. As Mr. Oke says: "The rapid growth of the already extensive jurisdiction of magistrates out of quarter sessions—to which every Session of Parliament adds some dozen or more fresh subjects for their cognizance—the various alterations by the statutes of 1858-59 and 60, and by decisions, especially since the facilities afforded by the 20 & 21 Vic. c. 43, for obtaining the opinion of a superior court, the addition of several new titles (amongst which are the titles "*Excise*" and "*Factories*"), the extension of others, and many improvements adopted at the suggestion of certain subscribers, have necessarily, although much matter has been compressed into smaller space, added some hundred and twenty pages to the bulk of the work in excess of the previous edition." Mr. Oke, speaking of the rapid growth of magisterial law, states that the first edition of this work treated of 1,800 offences, "in respect of which the justices of the peace are empowered to impose fines or terms of imprisonment, varying from the smallest sum to £100, and from the shortest period to twelve calendar months, without a trial by a jury;" and, according to a calculation made and published by me some ten years ago, there were then nearly 2,000 of such offences, in addition to "upwards of 500 offences which are indictable and triable by a jury, and which must previously undergo an investigation before the justices of the peace in petty sessions," and the numerous other matters which partake of a civil character required to be disposed of in petty and special sessions. Some idea of the gradual increase of the duties of the magistracy may be formed from the fact that the public general statutes on magisterial law which are added

each year form on an average one quarter of the number of those passed. During the last Session, as to which so much has been said and written, 42 of the 154 Acts passed related more or less to the duties of justices of the peace. In 1858 there were 26 out of 110; and in 1859 there were 32 out of 101.

The "Magisterial Synopsis" is a work of which Mr. Oke may justly be proud; and magistrates, their clerks, and those who have to practise before magistrates, must be ungrateful indeed if they do not recognise the ability of the bulky volume, which is truly a monument of Mr. Oke's industry and ability.

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#### COOTE'S PROBATE COURT.

*The Practice of the Court of Probate in Common Form Business.* By HENRY CHARLES COOTE, F.S.A., Proctor in Doctors' Commons, author of "The Practice of the Ecclesiastical Courts," &c., &c. Also *A Treatise on the Practice of the Court in Contentious Business.* By T. H. TRISTRAM, D.C.L., Advocate in Doctors' Commons, and of the Inner Temple. Third edition, with great additions, and including all the statutes, rules, orders, &c., to the present time, together with a collection of original forms and bills of costs. 18s. London: Butterworths.

BUT a very short space of time has elapsed since we noticed the second edition of this volume; and we, therefore, presume the profession took us at our word, in recommending it to their attention. It is merely necessary to refer to the improvements and additions in this third edition, and we find that these consist of the following particulars:—"All the cases relating to Common Form Practice (as well reported as unpublished) which have been determined since the date of the last edition will be found duly recorded in the sections to which they respectively apply. Owing to a series of decisions upon the subject, the principles upon which the dispensatory power of the 73rd section of the Court of Probate Act, 1857, may be invoked by the sutor have been more fully elucidated than was practicable at a former period. The subject of Scotch and foreign wills and the granting of letters of administration of the estates of foreigners has also, through the same means, been treated with more particularity than in the preceding editions. The new fiscal regulations of the 22 & 23 V. c. 36, and 23 V. c. 15, have received the notice which is due to their importance. New tables of Fee Stamps and of Practitioners' Fees issued upon the authority of the first-mentioned Act are likewise appended to the present Edition. The Forms have been methodically arranged and their numbers largely increased. Amongst them there will be found the affidavits recently prepared for the use of the Commissioners of the Inland Revenue in pursuance of the 23 V. c. 15. Bills of Costs in all cases of Common Form Business, as well as in Contentious Proceedings, are now for the first time added." There cannot be a doubt that the work of Messrs. Coote & Tristram is the work on its peculiar and important branch of the law; and we advise

all who are now or hope to be concerned in matters relating to probate to possess themselves of the volume, and then they cannot fail to be prepared for every emergency. The branch of law to which the work is devoted not being generally known renders it almost indispensable that the practitioner should be furnished with such a work.

#### OKE'S TURNPIKES.

*The Laws of Turnpike Roads: comprising the whole of the general Acts; the Acts as to the Union of Trusts for facilitating arrangements with their Creditors; the interference of Railways and other Public Works with Roads, their non-Repair, and enforcing Contributions from Parishes (including also the Acts as to South Wales Turnpike Roads), &c., &c.; practically arranged with Cases, Notes, Forms, &c., &c.* By G. C. OKE, author of "The Magisterial Synopsis," and "Magisterial Formulist," &c. 18s. 2nd edition. London: Butterworths.

We had thought the previous work would have sufficed to exhaust the most herculean of authors, but to our amazement we find another production of Mr. Oke's, which, if not so large a work, yet must have required considerable labour to place it before the profession. It is of a more limited character than the "Synopsis," but in its sphere of no less utility, relating as it does to that important portion of law applicable to Turnpike Roads, in which the general public necessarily take some interest, being thereunto moved by the demands of the "Pike-man," who appears, however, to have no friendly sympathy with the volunteers. Speaking of the 1st edition (1854), Mr. Oke informs his readers that the principal additions and alterations which had been there lately made were the acts for the Union of Turnpike Trusts and Districts for more economical management;—the acts providing for the setting apart of a certain sum yearly for a Sinking Fund to discharge Mortgage Debts on the Tolls; the act for facilitating Arrangements with the Creditors of Insolvent Trusts, by empowering the Home Secretary, with the consent of a certain amount of creditors, to reduce the rate of, or extinguish the interest on, mortgage debts;—the act authorising the application of a portion of the Highway Rate to the repairs of Turnpike Roads;—the enactments in the Railways Clauses Consolidation and other acts relative to the interference by railways with such roads;—many extensions of the exemptions from tolls, as well as a variety of amendments of the general laws as to Turnpike Roads in statutes not directly applicable to that subject.

All these provisions and the general Turnpike Road Acts, omitting the repealed and repealing clauses, are contained in the present work, with copious notes, the decisions down to the latest period, and a large body of necessary forms, more than double the number given in any previous work.

The present edition is made conformable to, and so as clearly to show the law at the present moment relative to turnpike roads, and we can assure our



readers interested in the law relating to such roads, that Mr. Oke's labours will take them very comfortably, and, as it were, over a very smooth macadamised road, in such recondite matters as tolls, repairs, diversions, exemptions from tolls, drivers, creditors, railways, &c.

#### GLEN'S HIGHWAYS.

*A Treatise on the Law of Highways: comprising the Statute Law, and the Decisions of the Courts on the subject of Highways, Public Bridges, and Public Footpaths, practically arranged; including the Law of Highways in Districts under Local Government Boards, the South Wales Highway Act, 1860, and an Appendix of Statutes.* By W. C. GLEN, Esq., Barrister-at-Law, Author of the "Law of Public Health and Local Government," "Architectural Jurisprudence," &c. London: Butterworths.

It is fitting, after despatching a work on turnpike roads, that we should come to one on "highways, public bridges, and public footpaths," &c. The author tells us that the present work was suggested to him by the want frequently experienced of a practical arrangement of the law of highways, and he has therefore endeavoured to furnish his readers with a lucid exposition of the law of highways, arranged in what may be described as the natural sequence of events, opening with the appointment of officers for the management of the highways, and closing with the enforcement of penalties and forfeitures for offences against the law; so that any one desirous of ascertaining the law upon any particular subject may readily find all that he desires to know upon it, expressed in language devoid of technical phraseology and tautology of Acts of Parliament—which are more than usually conspicuous in the General Highway Act. With the same object he has endeavoured to place the decisions of the courts in such a manner as would elucidate the statute law and regulate future proceedings. The chapter on highways in districts under local boards of health and local government boards has been adapted to suit the present work, from the author's treatise on the law of public health and local government, with such alterations and additions as were found to be necessary. It is impossible for us in our limited space to give a more full statement of the various contents of the volume, but we may safely say that Mr. Glen's work will be found extremely useful to all who have any concern with the law of highways.

#### STEPHEN'S COMMON LAW PROCEDURE ACT.

*The Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), with Practical Notes and an Introduction explanatory of the new Equitable Powers conferred on the Courts of Law, and of the alterations in Procedure and Practice effected by the Statute.* By JAMES STEPHEN, Esq., LL.D., Recorder of

Poole, Editor of "Lush's Common Law Practice," &c., &c. London: Butterworths.

SOME years ago we had occasion to notice the edition of "Lush's Common Law Practice," issued under the superintendence of Mr. James Stephen, and the present small work is intended as a supplement to that work. In an introduction Mr. Stephen notices the various Reports of the Common Law Commission of 1850, and the suggestions with respect to the much vexed question of the "fusion of Law and Equity" (in which respect our readers know the act is a failure), as to Interpleader, Procedure and Practice, and some miscellaneous provisions in the act. He subsequently gives the statute itself accompanied by notes, with references to the appropriate places in Lush's Practice. The notes, on which the chief value of the volume depends, appear to us to be very satisfactory, as, whilst not too lengthy, they contain just the sort of information and explanation which either the Practitioner or the Student may be presumed to require. A good index makes reference to the appropriate subjects very easy.

#### HUNTER'S LAW OF PROPERTY.

*The Act to further amend the Law of Property (23 & 24 V. c. 38), with Introduction and practical Notes, and with further Notes on the 22 & 23 V. c. 35.*

By SYLVESTER JOSEPH HUNTER, Esq., Barrister-at-law, &c. 2s. London: Butterworths.

MR. HUNTER's edition of the original Act of Lord St. Leonards respecting the Law of Property was noticed by us at length in the present volume, and we have now to welcome an addition thereto, in the shape of a small work on the more recent statute. Mr. Hunter has proceeded with the amending Act as with the original one; and the two works together form a very useful comment on the two Acts. The author has taken the opportunity to add some further notes on the original Act, by way of notice of the various decisions thereon, which, being introduced in the appropriate parts, enable the reader to ascertain the meaning of the Legislature, as interpreted by the judges.

#### LAW MAGAZINE.

*The Law Magazine and Law Review; or, Quarterly Journal of Jurisprudence.*

For November, 1860. London: Butterworths.

THIS number of our quarterly contemporary contains some articles of interest and value; such are especially those on Assize Amenities, the Origin and Progress of Commercial Law, Lord St. Leonards' Act to further amend the Law of Property, Lord Cranworth's Trustees and Mortgages Act, Judicial Contradictions, and some others, for which we must refer the reader to the magazine itself.

## Foot Points.

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### No. 53.—*Trustee out of Country.*

A suit is about to be instituted respecting a trust estate vested in a trustee who is out of the country, but from whom no conveyance or other act is required. Can the suit be proceeded with in his absence? There was a provision in the act known as Sir Edward Sugden's Trustee Act, but this act has been repealed by the existing Trustee Act, and the provision relative to such absent trustee is not re-enacted, and is not, so far as I can ascertain, elsewhere re-enacted. Perhaps some of your practical subscribers can give me the required information.

T. O. T.

### No. 54.—*Incapacity—Purchase-money.*

A. B. is far advanced in years; imbecile, though not idiot or lunatic in the ordinary sense.

He has a mortgage on land, which a railway company are about to take under their act, but he cannot execute a deed, and there is no one to legally sign for him, as no steps in lunacy have been taken, from regard to his feelings.

If matters remain in statu quo, what will the railway company do with his share of the purchase-money; and if they pay it into court, how can it be got out?

### No. 55.—*Separate Estate—Restraint of Anticipation.*

A., a married woman, is entitled for her life to the income of certain real estates vested in a trustee in trust for her, and she is restrained from alienating or anticipating the income. The trustee retained the income for several years, and applied the same to his own use. He offered a composition of ten shillings in the pound, which A. accepted, and she and her husband executed a release of all demands to the trustee. A. is now desirous of having the release set aside, and insists on being paid her full claim, contending that she was incompetent to release her claim, she being restrained from alienating or anticipating her income. Has A. any chance of success, on this or any other and what ground.

W. S. H.

### No. 56.—*Lease—Effect of Covenant in, that Lessor's Solicitor shall prepare all underleases, &c.*

It is usual for a lessor's solicitor to insert in a lease, prepared by him, a covenant by the lessor that all assignments and underleases shall be prepared by him (the solicitor). *Quære*.—On breach of such a covenant can the lessor re-enter? Recent decisions seem to point to a *negative* answer. I shall be glad to be referred to any decisions or dicta pointing to an *affirmative* answer, or to receive opinions upon the point.

JOHN W. S. LAVENDER.

## Answer to Moot Point.

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No. 49.—*Power of Sale to Executors* (*ante*, pp. 132, 176).

Subsequently to my sending up this moot point, counsel's opinion was taken on the subject. Such opinion corresponds exactly with your correspondent J. W.'s answer, and also answers his query as to the fee being conveyed by the mortgagee, in the affirmative. T. G. S.

NOTE.—This is very satisfactory, and we are glad the mooter has given an opportunity for a public expression of the satisfaction which must accrue to "J. W." from his answer being thus found correct.—ED.

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## ADDRESS TO OUR READERS.

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We find that our former address (pp. 161—165) is not fully comprehended by very many of our readers, particularly as to payment of arrears, ordering the publication direct from the proprietors instead of through a bookseller, and *pre-payment*.

It is essential that all arrears of subscriptions up to the present number should be *forthwith* paid, and this should be done in the manner before directed—that is, by post-office order, payable to JOHN LANE, of No. 10, Offord-road, Barnsbury, London, N., and addressed simply "Law Chronicle, No. 10, Offord-road, Barnsbury, N." We have already urged this on our subscribers, but we are sorry to say that they have not yet responded to our appeal and other applications to such an extent as we had expected, considering the position in which we are placed. We trust, however, that now there will be no further hesitation in complying with our requests, and that we shall be forthwith favoured with Post-office orders for such arrears. We are sorry to find that many of our so-called subscribers are not now to be found, many letters being returned indorsed by the postmen "Gone away, not known where;" or, "Gone to Australia;" or, "Dead, and no one will take in letters;" or, "Insolvent;" or, "Bankrupt," and similar unpleasant memoranda. It occurs to us that some of these indorsements may not be true, and that if we publish a list of the names of such parties, some of our paying subscribers may be able to inform us of the true state of circumstances, and we propose carrying this into effect very shortly.

As to the second of the before-mentioned points—namely, *ordering the publication direct from the proprietors*—we wish to impress the necessity of attention in this respect on all those who do not now take the publication

direct from the proprietors, for after the present number the publication cannot be obtained through any bookseller, stationer, or other person than the proprietors, to whom therefore a letter should be *forthwith* sent in a form similar to the following:—"Send me the **LAW CHRONICLE** from January next and until countermanded, through the post," adding the name and address, and repeating such name and address legibly, so that there may be no mistake, and addressing the letter thus:—"Law Chronicle, No. 10, Offord-road, Barnsbury, N." We have already mentioned that we do not intend to print more copies than required, so that it will be necessary that those who have not hitherto obtained the publication direct from us should send up their orders immediately, that there may be no difficulty in supplying all who may desire to be subscribers. We should take it as a personal favour if this were done *immediately* after the receipt of this number, or at all events *immediately on reading this request*.

With respect to the third point—namely, *pre-payment* of subscriptions—there appears to be a misconception, as we do not *insist* on such pre-payment, though we should be glad to have it from as many as are willing to adopt the system. We should, however, prefer not having any sent up just now, but to await the issue of the January number, as some alteration may be there announced.

We cannot say anything here as to the complaints made of neglect, further than that we were not aware thereof, and are extremely sorry that such should have been the case; and we can assure our subscribers that the like will not again happen, as all their letters will be read by the Editor, and he will see that they receive proper attention. We cannot but think that under the circumstances it is rather harsh to visit us with countermands for conduct of which personally we had no cognizance, and we trust that our subscribers will see the justice of this view of the matter, and recall the countermands sent in only on such ground. We defer other remarks until the issue of the January number.

THE  
MODERN LAW DICTIONARY,

FROM

Abandonment to Decree.

BY THE

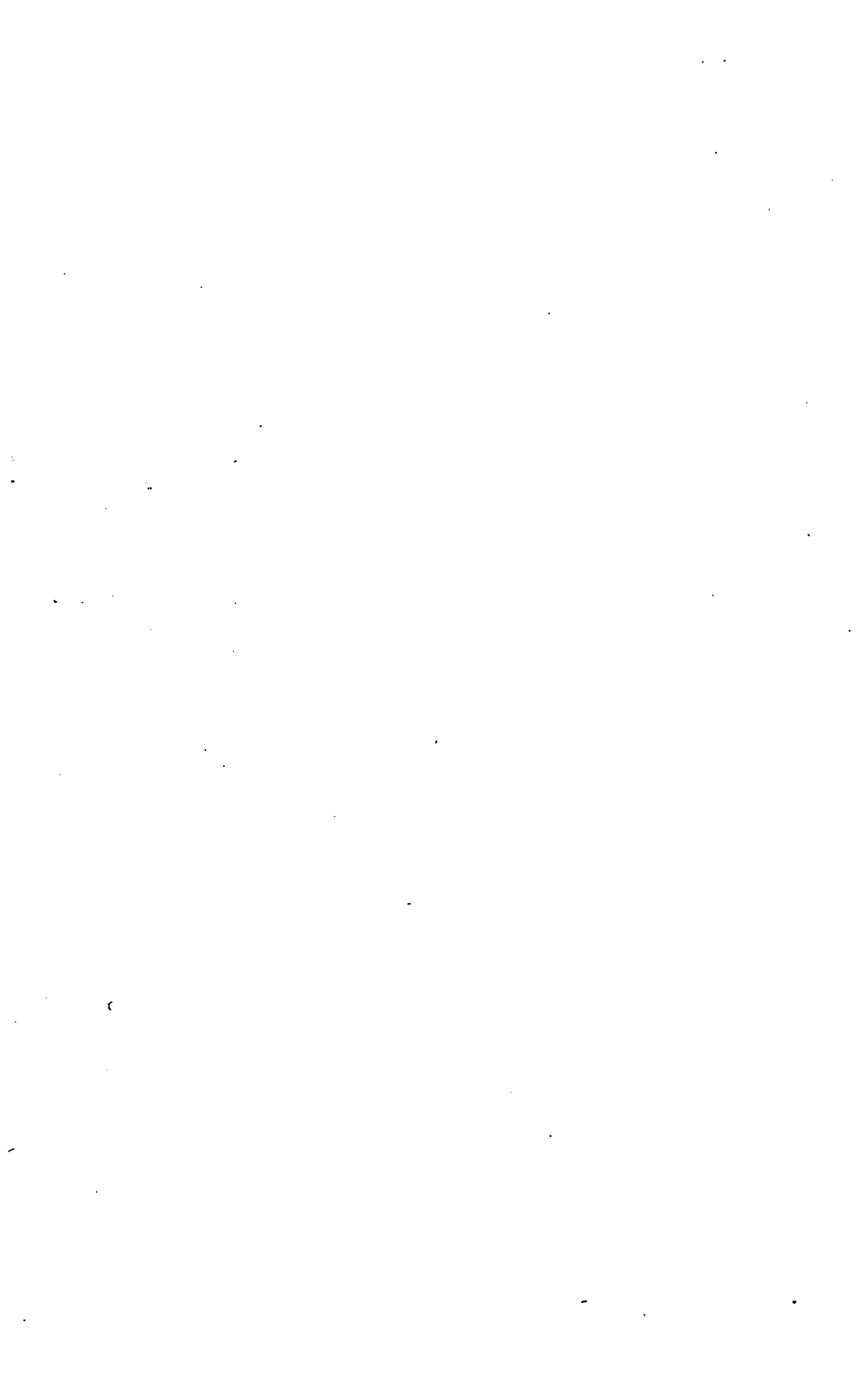
EDITORS OF THE "LAW CHRONICLE."

LONDON:

THOMAS F. A. DAY, LAW BOOKSELLER & PUBLISHER,  
18, CAREY STREET, LINCOLN'S INN, W.C.

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1860.



# THE

## MODERN LAW DICTIONARY.

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### A.

**ABANDONMENT**, in the maritime law signifies the exercise of a right which a party, having insured goods, has to give up or abandon them to the insurers (when by some peril of the sea they have become of little value), and to call upon them to pay the full amount of the insurance as if the whole property had been lost. Notice of the abandonment must be given within a reasonable time to the underwriter (Selw. N. P. 973, 11th edit.; Rosc. Ev. 302—304, 9th edit.). Where a loss is *actually* (and not merely constructively) total, no abandonment is necessary to found the claim (3 Kent's Com. 318); a loss is total, and therefore needs no abandonment, where the ship is lost, destroyed, captured or reduced to a mere wreck or congeries of planks, so as to exist as a ship for no useful purpose (Cambridge v. An., 2 B. & C. 691).

**ABATEMENT**. The principal instances in which the word is used are the following:—1. Abatement of freehold; 2. Abatement of nuisance; 3. Abatement amongst legatees; 4. Plea of abatement; 5.

Abatement by the death, marriage, bankruptcy, or insolvency of parties in an action or suit. *Abatement of freehold* is where a person dies seised of an estate of inheritance, and before the heir or devisee enters, a stranger who has no right enters and obtains possession of the freehold: such entry is called an abatement, and the party is termed an abator. *Abatement of nuisance* means the remedy which the law allows the party injured by a nuisance, of destroying or removing it by his own act, so as he does not commit any riot nor occasion (in the case of a *private* nuisance) any damage beyond what the removal necessarily requires. *Abatement amongst legatees* means the proportionate reduction or abatement which legatees are subject to have made in the *pecuniary* legacies bequeathed to them, when the funds out of which such legacies are payable are not sufficient to pay them in full. *Specific* legatees do not abate rateably with pecuniary legatees, but only where there is not sufficient to pay debts without the specific legacies (Richards v. Br., 3 E. N. C. 493; 2 Steph. C. 216). *Plea of abatement* means such a plea as shows some ground for



abating, or quashing the declaration in a personal action. It is on account of a *misjoinder* of either plaintiff or defendant, as to which see *Princ. C. L. 8—10*; 3 & 4 Will. 4, c. 42, ss. 8, 11; C. L. P. Act, 1852, ss. 36—39; R. G. H. T. 1853, pl. 6. The *misnomer* of a party is not now ground for a plea in abatement (3 & 4 Will. 4, c. 42, s. 11; 1 Bro. Pract. 627). *Abatement by death of parties* means the ending or abatement of an action or suit in consequence of the death, marriage, bankruptcy, or insolvency of either plaintiff or defendant before judgment or decree. In *equity*, the death of a plaintiff abates the suit altogether, unless his interest survives to a co-plaintiff (10 Jur. 169). The marriage of a female plaintiff (but not a defendant) abates the suit. The death of a defendant abates the suit if his interest passes to a stranger. The bankruptcy or insolvency of either plaintiff or defendant merely makes the suit defective and does not abate it. A simple order to revive may be obtained in any of these cases except against the devisee of a plaintiff (5 W. R. 221; Ayckb. 347—352, 6th ed.). At *common law*, the death, marriage, bankruptcy or insolvency of a plaintiff or defendant does not now cause the action to abate, but the same may be continued by suggestion or revivor (C. L. P. Act, 1852, ss. 135—141; 3 Steph. C. 667, 4th ed.; 3 L. C. 386).

**ABDUCTION.** The taking away of any female; as a daughter, from her parents, a ward from her guardian, or an heiress from her home, against their will, either by fraud, persuasion, or open violence (4

Steph. C. 154, 163; F. Bk. 315; 9 Geo. 4, c. 31, ss. 19, 20).

**ABEYANCE OF DIGNITIES.** Where a person possessed of a dignity or title of nobility dies leaving only females, the dignity, being impartible, falls into a dormant state, and is then said to be in suspense or *abeyance*. The Sovereign has the prerogative of terminating the abeyance, by nominating any one of the co-heirs to it: and such nomination operates, not as a new creation, but as a revival of the ancient barony, and the nominee becomes entitled to the place and precedence of the ancient barony. The Sovereign cannot dispose of the dignity to a stranger (3 Cru. Dig. tit. 26, Ch. 3, ss. 12, 18).

**ABEYANCE.** The fee simple or inheritance in lands is generally vested in some particular person or corporation. In the case of a parson, indeed, the fee is said to be only in remembrance, intendment, or consideration of the law (1 Steph. C. 237, 4th ed.; Litt. s. 646). Where the owner of the fee grants or devises the land to A. for life, and afterwards to the heirs of a living person, the fee remains vested in the grantor or devisee, and is not in abeyance (Fearn, ch. 6; 6 Cl. & Fin. 855; 2 Bl. C. 107, note by Chris.). This has been a great matter of dispute among the learned, but the point is now considered as settled (F. Bk. 121; 1 Steph. C. 237, 327, n., 4th ed.; 2 W. Saund. 381 a., n. 16). Where the conveyance operates by the Statute of Uses, there does not seem to be room for doubt.

**ABJURING THE REALM.** This is

an old title of the law, but it should seem that no man can claim any right or prejudice any other's right by abjuring the realm, for no man can lawfully put off his allegiance, and become the subject of another Sovereign or country (2 Steph. Com. 405, 4th edit.; 1 Bl. C. 369; F. Bk. 65; see *Fitch v. We.*, 12 Jur. 78).

**ABSCONDING DEBTORS.** The mode of proceeding by *Capias* against a defendant about to quit the country (1 & 2 Vic. c. 110) was found to be defective, as the time necessarily occupied in applying to a judge of the superior courts for leave to sue out the writ, often enabled the debtor to leave the country before he could be arrested. To remedy this, the "Absconding Debtors' Arrest Act, 1851" (14 & 15 Vic. c. 52), enables a district bankruptcy commissioner or judge of the county courts (except in Middlesex or Surrey) to grant a warrant to a bankruptcy messenger or county court high bailiff to arrest, within seven days, the debtor, and to keep him until he gives bail, or makes deposit, or pays the debt and costs, &c. (3 St. C. 567, n., 4th edit.; F. Bk. 357; 1 L. C. 8).

**ABSTRACT OF TITLE.** An abridgment of the deeds showing the right or title to an estate. A person's title to an estate is usually evidenced by certain deeds, thence denominated *title deeds*; for estates are held by title (F. Bk. (118)). An *abstract of title* commonly consists of a short summary of all the most material parts of such deeds, arranged in chronological order, and according to certain prescribed forms. The usual object of an *abstract of title* is to furnish an intended purchaser, or

other person, with the means of ascertaining whether the party wishing to dispose of an estate, or to raise a loan thereon, has in fact a good and secure title thereto. This information might, of course, be obtained by a perusal of the deeds themselves; but the owner is naturally unwilling to part with the possession of the deeds, and hence an *abstract* of them becomes requisite for the convenience of the intended purchaser or other party desirous of ascertaining the nature and validity of the title. Indeed, a purchaser is not bound to accept the title deeds themselves, but is entitled to an *abstract* thereof at the expense of the vendor, unless there be a stipulation to the contrary (*Horne v. Wi.*, 3 Sc. N. R. 340; Dart, 80, 3rd ed.). The purchaser is entitled to retain the abstract if he accept the title; and even if he reject it, he need not return the abstract so long as there is any dispute respecting the title (Dart, 183, 3rd ed.).

**ABUSING CHILDREN** (whether with or without consent), under twelve years of age, or even *attempts* so to do, are punishable (4 Steph. C. 161, 4th ed.; 9 Geo. 4, c. 31, s. 17; 14 & 15 Vic. c. 100, s. 29).

**ACCEPTANCE OF BILL OF EXCHANGE.** An acceptance of a bill of exchange signifies the act by which the drawee (*i. e.*, the person on whom the bill is drawn) undertakes to pay the bill according to the terms specified in it; and which act consists in his writing the word *accepted* across the body of the bill, together with his signature, for now both inland and foreign bills re-

quire a *written* acceptance (3 L. C. 90; 19 & 20 Vic. c. 97, s. 6).

**ACCEPTANCE OF ESTATE OR RENT.** The accepting or taking anything, which a person is not bound to accept or take is, when accepted or taken, binding in its operation and effect. Thus, no person can be compelled to take an estate, either beneficially or in trust, against his will: the party may refuse, or, as it is technically called, disclaim the estate; but if he once accept it he cannot disclaim (*Townson v. Ti.*, 9 B. & Ald. 31; *Begbie v. Cr.*, 2 B. N. C. 70; 1 Steph. C. 479, n., 4th ed.). So there may be an acceptance by receipt of rent. Thus, if a tenant for life of unsettled estates grant a lease to a man, and then dies, this lease will, by law, determine, or be at an end by such death, or, at least, at the expiration of the then current year of the tenancy (14 & 15 Vic. c. 25, s. 1; F. Bk. 133; 1 Steph. C. 261, 4th ed.); and if the remainderman accept rent from the party holding under such lease, such acceptance will not render the lease made by the tenant for life valid and binding against such remainderman (*Co. Litt.* 211); the reason is that the lease is *void*; and no acceptance of rent will set up a void lease, though it will be a *voidable* one, as, for instance, most ecclesiastical leases (see *Doe v. Collinge*, 13 Jur. 793; 4 L. C. 221; 4 Cru. Dig. tit. 32, ch. 5, s. 75; *Doe v. Taniere*, 13 Jur. 119; F. Bk. 76). But acceptance of rent, *as rent*, received *since* the death of the tenant for life, with knowledge of the death, may operate as an admission by the remainder man that the lessee is his tenant,

and so entitle him to notice to quit, and the tenancy will then be guided by the terms of the lease, and expire with the old year (4 Bac. Abr. Leases, I. 2; *Doe v. Watts*, 7 T. R. 83; *Roe v. Ward*, 1 H. Bl. 97). And where in addition there have been improvements made by the tenant, equity has decreed a new lease (*Stiles v. Co.*, 3 Atk. 692; 4 Cru. Dig. tit. 32, ch. 5, s. 78).

**ACCEPTANCE, OFFER OF.** Contracts are frequently made by correspondence, there being on the one part an offer, and on the other part an acceptance thereof. If the original offer leave nothing uncertain on the face of it, and be met by a simple acceptance, the treaty is, of course, concluded; if the reply be either more or less than a simple acceptance, the variation must be acceded to by the original proposer, or there is no agreement; and this state of things will continue, until there is, upon the face of the correspondence, "a clear accession on both sides to one and the same set of terms." For an original offer, or any subsequent proposal, which does not amount to a simple acceptance of the terms of the other party, may be withdrawn or varied at any time before it is accepted; even although a time be named for its acceptance, and it is revoked by the death or bankruptcy of the proposer before acceptance; and if rejected either by an express refusal, whether written or verbal, or a proposed variation either as to time for giving possession or price, or in any other particular, it at once ceases to be binding: and the acceptance of an offer must be given within a reasonable time; if, however, a person make an offer by

post, he cannot retract it, if the other party, before receiving any notice of withdrawal, return an immediate, absolute, and unconditional acceptance (Dart's Vend. 146—148, 3rd ed.; Cowley v. Wa., 17 Jur. 172; Taylor v. Po., 1 Jur. N. S. 1057; Meynell v. Su., 1 Jur. N. S. 737; Rosc. Ev. 233, 340, 9th ed.; Hutton v. Up., 2 H. L. C. 674).

**ACCEPTANCE OF SURRENDER BY TENANT.** The landlord's merely putting up a bill in the windows of a house which his tenant has quitted without a notice to quit, is not an acceptance of the parol surrender; but if the landlord have actually accepted a third party as tenant, this operates as a surrender at law of the first tenant's interest (Thomas v. Co., 2 B. & Ald. 119; Bessell v. La., 7 Q. B. 638); an agreement that on the tenant's quitting, the rent shall cease, and an acceptance of the key by the landlord himself, will operate as a surrender (Grimman v. Le., 8 B. & C. 324; Cannan v. Ha., 19 L. J. C. P. 323; as to the effect of a formal acceptance of the surrender, &c., see Lyon v. Re., 13 M. & W. 285; Michells v. At. 10 Q. B. 944; Rosc. Ev. 244, 9th ed.; Davison v. Ge., 26 L. J. Ex. 122.

**ACCEPTING SERVICE OF PROCESS.** On commencing legal proceedings against a party, it is generally necessary to deliver (or to *serve*, as it is termed) the writ or process *personally*, to or upon the defendant (Pract. C. L. 63, 64); but this may be dispensed with by the defendant's attorney or solicitor undertaking on his client's behalf to *accept* or receive from the opposite party such writ or *process*, which is

thence termed *accepting service of process*. The courts will enforce performance of the undertaking by attaching the attorney or solicitor (R. G. H. T., 1853, pl. 3).

**ACCESSARY.** A person guilty of a felony, not by being the actor, or actual perpetrator of the crime, nor by being present at its performance, but by being *somehow* concerned therein, either before or after its commission is termed an accessary. If *before* its commission, he is termed an accessary *before* the fact; if *after*, an accessary *after* the fact. An accessary *before* the fact is defined to be one who, being absent at the time the crime is committed, yet procures, counsels or commands another to *commit* the crime; and, in this case, absence is necessary to constitute him an accessary; for if he be present, he is guilty of the crime as principal. Thus, if A. advises B. to kill another, and B. does it in the absence of A., in this case B. is principal, and A. is accessary to the murder. An accessary *after* the fact is one, who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon; and generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes such assister an accessary: as furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or using open force and violence to rescue or protect him (4 Bl. C. 35, 36; 4 Steph. C. 113, 114, 4th ed.; F. Bk. 294). In treason, manslaughter, and all offences *under* the degree of felony, there are no acces-

saries (16 Jur. 390; F. Bk. 294). By the 11 & 12 Vic. c. 46, accessaries *before* the fact may be indicted, &c., as if principals; s. 2, provides for accessaries *after* the fact (F. Bk. 294; 4 Steph. C. 117, n., 4th ed.).

**ACCIDENT.** An action will lie for an assault happening by accident, as where a soldier in exercising, wounds one of his comrades by accident; but, if the injury was unavoidable, and the conduct of the defendant entirely without fault, no action lies (*Wakeman v. Ro.*, 1 Bing. 213). Thus, in actions for negligently driving, actual negligence must be shown, and, it is not sufficient merely to show an accident, unless it be of such a nature as to afford a presumption of negligence (*Rosc. Ev.* 567, 493, 9th ed.). As to accidental killing, see 9 & 10 Vic. c. 93, which, however, relates to negligence, though often confounded with mere accident (F. Bk. 245, 246; 3 St. C. 456, 4th ed.; *Princ. C. L.* 298).

**ACCIDENTS, RELIEF.** Though equity relieves against some accidents, it does not do so in all cases; the common law gives relief in some instances (4 Steph. C. 26; F. Bk. 279). The only two classes of cases of relief in equity on the ground of accident seem to be with reference to lost bonds, bills, and notes (and, as to these, relief is now obtainable in some instances at law (*C. L. P. Act*, 1852, s. 87; F. 212; 1 L. C. 162; 2 Id. 129), and the defective execution of powers (2 Sug. Pow. ch. 10).

**ACCOMPLICES, EVIDENCE.** The testimony of an accomplice is required to be corroborated in some material part by unimpeachable

evidence; otherwise the judge usually directs an acquittal (1 Phil. Ev. 31, 9th ed.; 4 Steph. C. 462; 3 L. C. 289, 290; F. Bk. 347).

**ACCOMMODATION BILL.** This is a bill accepted, without any value having been received by the acceptor, for the purpose of raising money by discount. It is called an *accommodation* bill, because it is accepted expressly for the purpose of accommodating the drawer or some other party, and upon the understanding that the acceptor is to be relieved from all liability incurred by having given his acceptance. A bill made payable at the drawer's house is *prima facie* evidence that it is an accommodation bill (*Sharp v. Ba.*, 9 B. & C. 44). There is no distinction between an accommodation acceptor and an acceptor for value, so far as regards a *bona fide* holder; thus an accommodation acceptor is not discharged by a release of the drawer (*Rosc. Ev.* 285, 9th ed.).

**ACCORD AND SATISFACTION.** A mutual agreement between parties that a certain recompense shall be paid by one and received by the other in satisfaction of a cause of action, followed by performance, is called accord and satisfaction. In order to be a good discharge of the cause of action the accord must be executed, that is, performed by the defendant and accepted by the plaintiff, before it can be pleaded; but the plaintiff may accept a valid *executory agreement* in satisfaction and it is then a question for the jury whether the *agreement*, and not the *performance* of it, was accepted in lieu and satisfaction (*Evans v. Po.*, 1 Ex. 601). The acceptance in satisfaction, as

well as the receipt by the plaintiff, must be shown, for the defendant may have paid in satisfaction, and the plaintiff may have accepted the payment, but have declined to take it except as part payment (*Hardman v. Be.*, 9 M. & W. 596). It must be borne in mind that the acceptance of a less sum in satisfaction of a *liquidated* demand of larger amount is not a good accord; but some *additional* benefit will make it sufficient (*Rosc. Ev.* 421, 9th ed.; 1 *Smith's Lead. Cas.* 150; *Norman v. Th.*, 4 Ex. 755; *Boyd v. Hi.*, 25 L. J. Ex. 246, correcting and explaining *Norman v. Th.*; *Cooper v. Pa.*, 24 L. J. C. P. 68).

**ACCOUNT, ACTION OF.** An action which lies against a party to compel him to render an account to another with whom he has had transactions; as against a guardian, bailiff, a receiver, or by one partner against his co-partner (*Holmes v. Hi.*, 1 B. & C. 76; *St. C.* 102, n., 4th ed.; *Co. Lit.* 172 a.). It is now nearly obsolete (*F. Bk.* 240, 241; 1 L. C. 68, 69). The time of limitation is now six years (19 & 20 V. c. 97, s. 9; 3 L. C. 89; see further, *Princ. C. L.* 20—24).

**ACCOUNTANT-GENERAL.** An officer of the Court of Chancery, appointed by 12 G. 1, c. 32, to perform all matters relating to the delivery of the suitors' money and effects into the bank, and taking them out again. This officer does not receive any of the money or effects of the suitors of the court, but they are placed in his name in the Bank of England, and he keeps an account with the bank according to the several causes and accounts to which

such money and effects severally belong (*Smith's Ch. Prac.* 12; *Maddock's Ch. Pr.* 777; *Prac. Eq.* 5, 6, 7). By the 5 V. c. 5, the Accountant-General must lay before Parliament an annual account. No money can be paid into the bank in the name of the Accountant-General in any cause without an order (2 *Dan. Pr.* 1650, 2nd ed.). The fund adopted by the Court of Chancery for investment is the 3 per Cent. Consols, but, under special circumstances, the court will allow of an investment in Reduced Bank Annuities (*Hanson v. Mu.*, 1 Jur. N. S. 917).

**ACCOUNT STATED.** An account stated is a balanced account, i. e., one agreed upon between the parties. To recover at law on an account stated, the plaintiff must prove an absolute acknowledgment by the defendant of the plaintiff's claim: a qualified one not being sufficient, as "I would have paid you if you had done so and so" (*Evans v. Ve., R. & M.* 239). A compulsive admission is not evidence of an account stated: it may be used, however, as an admission (*Rosc. Ev.* 51, 9th ed.). The account must be stated before action brought (*Spencer v. Pa.*, 3 Ad. & El. 331). An action will lie on an account stated on the *final* balance of partnership accounts, and no express promise is necessary (*Wray v. Mi.*, 5 M. & W. 21; *Carr v. Sm.*, 5 Q. B. 128). If an account is stated of the balance due on a *deed* or bond, no action will lie, as on a simple contract, it continuing to be a specialty debt (*Middleditch v. El.*, 2 Exch. 623). Errors in an account stated may be corrected (*Dails v. Ll.*, 12 Q. B. 531; *Wilson*

v. Wi., 14 C. B. 616; see further, Princ. C. L. 24—28). In equity a stated account (if final and in writing) is a good bar to a bill or claim for an account. The plaintiff can get rid of the stated account only by showing fraud or particular errors; if fraud be shown, the *whole* account is open, and the parties are not bound by agreed deductions, &c.; if errors only, the account is opened so far only as the plaintiff can show omissions of credits (which is a surcharge) or a wrong charge (which is a falsification): the *onus probandi* lies on the plaintiff (1 Dan. Pract. 353, 633, 635, 2nd ed.).

**ACKNOWLEDGMENTS BY MARRIED WOMEN.** By the 3 & 4 Will. 4, c. 74, ss. 40, 77, a married woman may by deed dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and disposed of, release, surrender, or extinguish any estate therein, and may release or extinguish powers as if she were a feme sole (F. Bk. 185); but to render the same valid, her husband must (unless leave be obtained to dispense therewith) concur, and the deed must be *acknowledged* by her, that is, it must be acknowledged by her to be her own act and deed. Several other acts give to married women powers of disposition, and require acknowledgments of the deeds; as the 8 & 9 Vic. c. 106, s. 7, enabling them to disclaim real estates (F. Book, 111, 186); the 20 & 21 Vic. c. 57, enabling them to dispose of future or reversionary interests in personality (1 L. C. 264; 4 Id. 156). For the purpose of taking or receiving the acknowledgments of married women in

such cases, certain commissioners are appointed in each county, who are empowered to examine them apart from their husbands touching their knowledge of the contents of deeds and of their voluntary consent to execute them, previously to the same being signed or executed by them; and these commissioners are thence termed "commissioners for taking the acknowledgments of married women." The acknowledgments may also be taken before a judge of one of the superior courts or of a county court, or Master in Ordinary in Chancery (the latter will soon cease). The acknowledgment may be made after the deed is enrolled. The acknowledgment must be made in order to bar the heir (F. Bk. 186).

**ACQUITTANCE.** A release or discharge in writing of a debt or duty which previously was to have been paid or performed. If rent be behind for twenty years, and the lord make an acquittance for the last that is due, all the rest are presumed to be paid (Co. Lit. 373 b); but not being under seal, and being only a presumption, it may be rebutted by evidence (Graves v. Kay, 3 B. & Ad. 318). The ordinary acknowledgment, in a deed, of the receipt of money is, at law, conclusive evidence, as between the parties to it, of such receipt: the receipt indorsed on the back of the deed is not considered conclusive. In equity the contrary rules obtain (Baker v. De., 1 B. & C. 704; Stratton v. Ra., 2 T. R. 366; F. Bk. 168).

**ACT OF GOD.** Any inevitable accident or event which takes place without the intervention of man, or

which cannot be referred to any specific cause, is said in the language of the law to have happened or taken place by the act of God. (per Mansfield, C. J., in *Farward v. Pittard*, 1 T. R. 33). It is a rule of law that the act of God shall not be construed to affect any one injuriously; *actus dei nemini facit injuriam* (2 Bl. C. 122; Broom's Max. 168, 171, 2nd ed.). In particular carriers are not liable for loss or damage arising from the act of God; as storms, tempests, &c. (*Ross v. Hi.*, 2 C. B. 890).

**ACTIONS.** An action is defined by some to be "the lawful demand of one's right;" by others *jus prosequendi in judicio quod sibi debetur* (Co. Lit. 285 a). The word, however, as used in the present day, seems rather to signify the *formal means* which the law has prescribed for the recovery of one's rights, and for the redress of civil injuries. Actions are divided into *real*, *personal*, and *mixed*. *Real* actions are such as are brought for the recovery of *real* property; that is, of lands, tenements, or hereditaments. *Personal* actions are such as are brought for recovery of goods and chattels, or for a debt, or for damages for some injury done to a party's *person* or property. *Mixed* actions are such as partake of the nature of both the two former kinds, and yet are not reducible to either one exclusively; having for their object the recovery of lands or tenements, and *also* damages for the injury sustained by their being withheld. Real and mixed actions are now but few; being writs of dower, *quare impedit*, and, though not with great propriety ejectments

(F. Bk. 238, 239; 3 Steph. C. 448, 4th ed.; 1 L. C. 65; Princ. Com. L. 3.)

**ACTS OF BANKRUPTCY.** Before a trader can be made a bankrupt, it must be shown that he has committed or permitted one of the acts denominated an act of bankruptcy, and which are specified in the Bankruptcy Consolidation Act, ss. 67—83. These acts of bankruptcy occur by a trader's—1, departing the realm; 2, remaining abroad; 3, departing from his dwelling-house, or otherwise absenting himself; 4, beginning to keep house; 5, suffering himself to be arrested or taken in execution; 6, suffering himself to be outlawed; 7, procuring himself to be arrested or taken in execution, or his goods, &c., to be taken in execution, &c.; 8, making any fraudulent grant, gift, or transfer of his lands or chattels. The preceding acts depend upon the debtor's intent to defeat or delay his creditors, and such intent suffices without any actual delay (*Rouch v. G. W. R. Co.*, 1 Q. B. 21); those which follow do not depend upon proof of intention—viz., 9, lying in prison for twenty-one days after arrest or detention for debt; 10, escaping out of prison; 11, compounding with the petitioning creditor for his debt, to the prejudice of the other creditors (s. 71); 12, filing a declaration of insolvency, provided a petition for adjudication be filed within two months (s. 70); 13, filing a petition in the Insolvent Debtors' Court if an adjudication be obtained before the time appointed for hearing, or within two months from the making of the vesting order; 14, filing a petition for private ar-



range ment if it be dismissed, and the petition for adjudication be filed within two months thereafter ; 15, an assignment for the benefit of creditors, even if executed and advertised as by sec. 68 of the Consolidation Act is required, if there be a petition within three months ; 16, not paying, securing, or compounding within seven days after demand a debt or demand arising by judgment, decree, or order in equity, bankruptcy, or lunacy (ss. 72, 73) ; 17, not paying, securing, or compounding a debt within seven days after being summoned to the bankruptcy court on an affidavit of the debt, and service of particulars, and of notice requiring immediate payment of the debt (ss. 78—86) ; 18, a trader, being a member of Parliament, not paying or compounding within one month after service of a writ of summons (an affidavit of the debt having been filed), or not entering into a bond with sureties, and thereupon entering an appearance (s. 77). For more detailed information, see 1 L. Chron. 189—199, 223—229, 251—258, 262, 334, 440 ; 3 Id. 27—29. No person is liable to become bankrupt on an act of bankruptcy committed more than twelve months (s. 88), and as above shown in some instances, the act must be taken advantage of within a less period.

**ADEMP TION OF A LEGACY.** The taking away of a legacy : or, the destruction or cesser of existence of the thing given (5 L. C. 83). This arises from a supposed alteration in the testator's intention. For instance, if a man who has a sum of money due to him on a bond, expressly bequeaths it to some person named in his will, and after

having done so calls in the money himself, in such case the party to whom it was bequeathed loses the money as a matter of course. Where a testator gives a sum of stock, which after the date of his will is transferred into his own name, and so stands at the time of his death, it is no ademption ; but if he sells out the stock, and it cannot be further traced, it is an ademption (*Lee v. Lee*, 6 W. R. 846 ; 5 L. C. 83). A kind of ademption also arises by satisfaction of a bequest, as by subsequent advances by the testator to a legatee to whom he stands in *loco parentis* (*Ferris v. Go.*, 6 W. R. 485 ; 5 L. C. 102). A bequest of residue or part of residue may be a satisfaction of a legacy, either altogether or *pro tanto* according to the amount (*Thynne v. Gl.*, 12 Jur. 805).

**ADJUDICATION IN BANKRUPTCY.** An adjudication in bankruptcy is the adjudication by the Bankruptcy Court (Commissioner), on the proofs adduced, that the debtor, being amenable to the bankrupt laws, is a bankrupt. This adjudication is either obtained at the instance of a creditor to a proper amount (called the petitioning creditor), or on the petition of the debtor himself, having assets to the extent of £150. In one instance no petition for adjudication is required, as where the debtor has filed a petition for arrangement, and he is held not entitled to the benefit of that proceeding (*F. Bk.* 217, 222 ; 2 St. C. 157, 4th ed. ; 1 L. C. 321—325 *et seq.*).

**ADJUSTMENT** (*in marine insurance*). When the quantity of damage

sustained in the course of a voyage is known, and the amount which each underwriter upon the policy is liable to pay is settled, it is usual for the underwriter to indorse on the policy, *adjusted this loss* at so much per cent., or some words to the same effect, and this is called an *adjustment*. The rule on an open policy is to estimate the actual value of the subject insured, at its actual or market value, at the commencement of the risk. The object is merely to put the party in *statu quo*, and not to indemnify him for the loss of prospective profits (3 Kent's Com. 335). When the actual or market value at the port of departure differs from the invoice price, it seems that the real value is to be taken instead of the prime cost or invoice price. The loss of freight is not to be considered, unless the freight be also insured (3 Kent, 336; Rosc. Ev. 304, 9th ed.). An adjustment is only *prima facie* evidence against the underwriter, and does not bind him, unless there was a full disclosure of the circumstances of the case (1 Campb. 274).

**ADMINISTRATION.** The act of administering, or disposing according to law, of the goods and chattels and personal property in general of a person dying intestate: and the person who so administers or disposes of an intestate's property is thence termed an *administrator*; or if a female, an *administratrix*. An *administration durante minore ætate* is such an administration as is granted to some person during the minority of some other person who would otherwise have administered; if one of several executors be of age

and will prove no administration is requisite (1 Will. Ex. 419, 5th ed.). So administrations *durante absentie* or *pendente lite* are such as are granted to a person when the executor is out of the realm, or when a suit is commenced in the Court of Probate touching the validity of the will (20 & 21 V. c. 77, ss. 70, 73, 74; F. Bk. 230). Administration *cum testamento annexo* is an administration which is granted to some person with the will annexed, when the testator makes an incomplete will without naming any executors, or when he names incapable persons, or when the executors named refuse to act (20 & 21 V. c. 77, s. 79). An administration *de bonis non* is an administration granted to some person for the purpose of administering such of the goods of the deceased as were not administered by the former executor or administrator, and the person to whom in this case the ordinary grants administration is thence termed an *administrator de bonis non* (2 Bl. C. 502, 503; 2 Steph. C. 202—208, 4th ed.; F. Bk. 227—230). Administration was till lately (with rare exceptions) granted by the ecclesiastical courts, but now it is granted by the Court of Probate, certain district registries, and the county courts (F. Bk. 228; 4 L. C. 165—169; 20 & 21 Vict. c. 77; 2 Steph. Com. 204, 205, 4th ed.).

**ADMIRALTY, COURT OF.** A court wherein are tried all matters arising on the high seas, or on those parts of the coasts which are not within the limits of an English county (4 Bl. C. 268). The judge of the Admiralty has in addition a special

commission from the Crown to adjudicate on *prize of war* (3 Steph. C. 429, 4th ed.). The criminal portion of the jurisdiction is transferred to the common law judges and the Central Criminal Court (4 & 5 W. 4, c. 36; 7 & 8 V. c. 2; 4 Steph. C. 376, 378, 4th ed.; F. Bk. 267, 372, 373).

**ADMITTANCE TO COPYHOLDS.** This term signifies the admission of a tenant into the possession of a copyhold estate; the same as livery of seisin was the formal mode of delivering the possession of a freehold estate. It is of three kinds — 1. Upon a voluntary grant from the lord, when the lands have escheated or reverted to him; 2. Upon surrender by the *former* tenant; 3. Upon a *descent* from the ancestor (2 Bl. Com. 369; F. Bk. 194). The admittance in the second case relates back to the surrender (Salk. 185; Co. Litt. 59, b. [d.]); in the third case, the heir is, upon the death of the ancestor, perfect tenant of the land for most purposes (1 St. C. 634, 635, 4th ed.; F. Bk. 194; 1 Jur. N. S. 1142).

**AD QUOD DAMNUM.** A writ so called, which ought to be issued before the Sovereign granted certain liberties; as a fair, market, &c., which might be prejudicial to others. The writ directs the sheriff to inquire *what damage* it might do for the Sovereign to grant such fair or market. It was also formerly in use for obtaining a right to turn the course of an old road, or make a new one; but by the Highway Act, the 5 & 6 Will. 4, c. 50, any two justices of the division may order highways to be widened or enlarged, and

(ss. 84, 91) orders may be made (to be confirmed at quarter sessions) to divert or stop up highways or footways (3 Steph. C. 239; 1 L. C. 17; Reg. v. Wo., 18 Jur. 424; 2 L. C. 305).

**ADULTERY.** The sin of incontinence between married persons. The crime of adultery is sometimes distinguished into *single* and *double* adultery. Single adultery is the crime of illicit intercourse between two persons *one only* of whom is married. Double adultery is the crime of illicit intercourse between two persons *both* of whom are married (4 Bl. C. 64, 65). The action for adultery, or, as it was sometimes called, criminal conversation, or, short, *crim. con.*, has been abolished by the 20 & 21 Vic. c. 85, s. 59; but by sec. 53, the husband may claim damages from the adulterer (F. Bk. 111; 4 L. C. 158).

**AD VALOREM DUTIES.** Are duties the amount of which is regulated *according to the value* of the property upon which, or in relation to which, the duties are imposed. They more especially refer to the duties imposed upon conveyances, leases, grants, &c., the stamp upon which is fixed according to the amount of the consideration money paid, or according to the value of the land conveyed or transferred by such instruments (see 55 G. 3, c. 184; 13 & 14 V. c. 97; 17 & 18 V. c. 83).

**AD. VENTREM INSPICIENDUM.** A writ which lies for the heir presumptive to an estate, to examine the widow who says she is with child, and who is suspected to feign being so, with the view of pro-

ducing a supposititious heir to the estate (2 St. C. 293; 3 Id. 599, n., 4th ed.).

**AVOW AND AVOWRY.** To **avow** signifies to justify an act formerly done. In replevin a defendant being the party entitled to the rent, &c., avows, by a plea called an **avowry**, the taking of the distress in his own right or the right of his wife, whilst the bailiff, &c., makes cognisance as acting under the command of the party having the right to distrain (F. Bk. 250). As to the form of an **avowry**, see C. L. P. Act, 1852, s. 67.

**ADVOWSON.** The right of presentation to a church or benefice; and he who has the right to present is called a **patron** (Princ. C. L. 28, 29; Burt. pl. 1222). **Advowsons** are of two kinds—*appendant* and *in gross*. An **advowson appendant** means an **advowson** which is *appended* or annexed to a manor, so that if the manor be granted to any one, the **advowson** goes with it as a matter of course and as incident to the estate (Co. Litt. 307 a). An **advowson in gross** signifies an **advowson** that belongs to a person, and is not annexed to a manor; so that an **advowson appendant** may be made an **advowson in gross** by severing it by deed or grant from the manor to which it was **appendant**. **Advowsons** are also either *presentative*, *collative* or *donative*. An **advowson** is termed *presentative*, when the patron has the right of presentation to the bishop or ordinary, and also to require of him to institute his clerk, if he finds him qualified. An **advowson** is termed *collative* when the bishop and patron

happen to be the same person, so that the bishop, not being able to present to himself, performs by one act (which is termed *collation*) all that is usually done by the separate acts of presentation and institution. An **advowson** is termed *donative* when the king or a subject founds a church or chapel, and does by a single *donation* in writing place the clerk into possession, without presentation, institution, or induction (2 Bl. C. 21; 1 L. C. 173—183; Princ. C. L. 28—36; F. Bk. 137, 138).

**ADVOWSON OF THE MOIETY OF THE CHURCH** means that the same church has two several patrons, and two several incumbents; the one having the one moiety, and the other having the other moiety. A moiety of the **advowson**, means when two (as coparceners) must join in the presentation and there is but one incumbent; and though they agree to present by turns, yet each of them has but the moiety of the church (Co. Lit. 17 b; 7 A. c. 18; Gully v. B. of Lo., 10 B & C. 584; 1 L. C. 175, 176; Princ. C. L. 32, 33; Robinson v. B., 22 L. J. C. P. 21).

**AFFIDAVIT.** An oath in writing, sworn before some one who is legally authorised to administer such oath. To make *affidavit* of anything, means to testify to it upon oath in writing (3 Bl. C. 304). **Affidavits**, both in equity and at common law, are required to be in the first person, and divided into numbered paragraphs, &c. (Rule M. T. 1854; 1 L. C. 362, 435). In addition, in equity, **affidavits** must distinguish facts within the knowledge of the deponent from those by information

(Ord. 13 Jan., 1855, pl. 8; 1 L. C. 338).

**AFFINITY.** The relationship which marriage occasions between the husband and the blood relations of the wife; and between the wife and the blood relations of the husband. Thus there is an *affinity* between the wife and her husband's brother; but there is no affinity between the wife's *sister* and the husband's brother (1 Bl. C. 434).

**AFFIRMATION.** Originally applied to the testifying to the truth or falseness of anything by the sects called Quakers, Moravians, and Separatists; because they were permitted to give their evidence without having an oath administered to them, as was formerly the case with other persons; and they only simply affirmed the truth or falseness of anything. But this exemption has lately received a great extension, it being provided by the C. L. P. Act, 1854 (the 17 & 18 V. c. 125, s. 20), that if any person called as a witness, or required or desiring to make an affidavit or deposition, refuse or be unwilling from alleged conscientious motives, to be sworn, the court (on being satisfied of the sincerity of the objection) may permit such person to make a solemn affirmation or declaration instead (1 Rosc. Ev. 136, 9th ed.; 1 L. C. 158, 316).

**AFFRAY.** The fighting of two or more persons in some public place to the terror of others; and there must be a stroke given or offered, otherwise it is no affray; and the fighting must also be in public; for, if it be in private it is no *affray*, but an *assault* (4 Bl. C. 145; F. Bk. 308).

**AGENT.** An agent is a person appointed to act for another; this appointment may be either express or by implication of law arising from circumstances (F. Bk. 103). Even infants and married women, though for most purposes considered as persons under disability, may be and act as agents (Lindus v. Br., 5 C. B. 583; Smith v. Ma., 6 C. B. 486). When the appointment is express, it may be by parol, except where a deed is to be executed or a writing is required by statute (29 Car. 2, c. 3, ss. 1, 2, 3; but not under ss. 4 & 17), or in the case of corporations, in which latter case a deed is in general requisite (F. Bk. 96; Princ. C. L. 44). The agency determines on the death of the principal, except where it is accompanied by a consideration (Dickinson v. M., 14 M. & W. 713; F. Bk. 47). The contract of an agent is that of his principal: the maxim being, *qui facit per alium facit per se* (2 L. C. 54; 16 Jur. 1074; F. Bk. 103; Princ. C. L. 53); but where the contract is under seal in the agent's name alone, the principal cannot sue at law (Princ. C. L. 53). An agency cannot be delegated, the maxim being, *delegatus non potest delegare*, or, *Delegata potestas non potest delegari* (Cobb v. B., 6 Q. B. 936; Princ. C. L. 50; 2 St. C. 64—67, 4th ed.). An agent is either general or special: the former does not confer an unqualified agency; the latter is confined to a particular transaction (Princ. C. L. 45, 2 St. C. 65, 66, 4th ed.). The misapplication by an agent of any money or security, or the proceeds thereof, contrary to any written direction, and the unauthorised sale or pledge of any

chattel or security, are punishable under the 7 & 8 G. 4, c. 29. The selling, pledging, &c., with intent to defraud, by an agent, of property intrusted to him for safe custody is punishable under the 20 & 21 V. c. 54, s. 2 (F. Bk. 322, 324; 4 L. C. 154—156; 4 St. C. 200—202, 4th ed.).

**AGISTMENT.** The taking of other men's cattle into any ground for the purpose of feeding them at a certain rate per week. *Agistment* also signifies the profit of such feeding in a ground or field. The agister is under an implied contract to return the cattle to the owner on demand, and as he does not confer any additional value on the cattle, he has no lien thereon (Selw. N. P. 1889, 11th ed.; Jackson v. Cu., 5 M. & W. 342; 2 St. C. 79, 4th ed.).

**AGNATES** (*agnati*). Relations through the father, as cognates are relations through the mother (2 Bl. C. 233; 1 St. C. 410, 9th ed.).

**AGREEMENT** is an engagement between two or more persons concerning anything done or to be done See "*Contract*."

**ALIAS.** This is word as applied to writs signifies *another* writ; *alias* writs were commonly resorted to when those which had been issued before them had not taken effect (3 Bl. C. 283). But by the C. L. P. Act, 1852, alias writs are no longer requisite; the writ of summons may be renewed at any time before its execution (s. 11; Prac. C. L. 65); and writs of execution may also be renewed before their expiration (s. 124).

**ALIBI.** This word (signifying "elsewhere") is used to designate that mode of defence in a criminal prosecution which the accused party resorts to in order to prove that he could not have committed the crime with which he is charged, because he was in a different place at the time.

**ALIFN.** Any person (not being a child of the Sovereign, or of his ambassadors, or heir of the Crown) born in a foreign country, out of the allegiance of the Sovereign was formerly considered as an alien, but that is now too wide a statement, as several acts of Parliament have relaxed this strict rule (see F. Bk. 64—67; 2 St. C. 414, *et seq.*, 4th ed.).

**ALIEN ENEMY.** A person born in a foreign hostile country, out of the allegiance of the English Sovereign is so termed, in contradistinction to one born in a foreign country, out of the allegiance of the Sovereign, but on terms of amity with us. An alien enemy cannot sue on a contract made before hostilities until they have ceased (1 L. C. 290, 291; F. Bk. 68; 2 Steph. C. 17, 418, 4th ed.)

**ALIENATION.** The act of transferring the property in lands and tenements, or other things to another. When confined to real estate, it is, if *inter vivos*, called a conveyance; when leaseholds, it is called an assignment, and so of choses in action or even chattels which might have passed by mere delivery.

**ALIMONY.** That allowance which is made to a woman for her support out of her husband's estate when she is under the necessity of living

apart from him. This provision is allowed the wife during the *pendency* as well as after the determination of a suit between her and her husband, as well to provide the wife with the means to obtain justice as for her ordinary subsistence. When there has been a sentence of dissolution of the marriage, or even for a judicial separation, it is then called *permanent* alimony, and is continued during the period of their separation. By s. 82 of the 20 & 21 V. c. 85, the alimony may be either by securing to the wife a gross sum of money or an annual sum during her life. Upon an application for alimony, the court requires on the part of the husband a statement both of his casual and certain income to be set forth in his answer to the wife's petition 1 Bl. 440, 441; Rog. Ecc. Law, 85, 86).

**ALLEGIANCE.** The natural, lawful, and faithful obedience which every subject owes to his Sovereign (1 Bl. C. 366; F. Bk. 65). The 21 & 22 V. c. 48, has substituted one oath for the separate oaths of allegiance, supremacy, and abjuration (see form of oath in 5 L. C. 118).

**ALLOCATUR.** This word signifies it is *allowed*. After an attorney's bill has been examined or taxed by one of the masters, and the items which he disallows have been deducted, the remaining sum, certified by the master to be the proper amount to be allowed, is termed the *allocatur*.

**ALLOCATUR EXIGENT.** A writ used in the process of outlawry, (which now takes place only on final process), and directed to the sheriff,

in the usual case of there not being a sufficient number of county or hustings courts (five) between the delivery of the writ of *exigi facias* and its return, commanding him to cause the defendant to be required at the necessary additional successive county courts, or, in London, successive hustings, till he be outlawed for non-appearance, or taken if he appear (Archb. New Pract. 259; Will. Plead. 236).

**AMERCIAMENT.** A pecuniary punishment which an offender against the king or a lord in his court is subject to.

**AMOVEAS MANUS.** A writ which lies for a party who has been outlawed, and whose property has been taken by virtue of such outlawry, to restore him his property so taken (R. v. Evans, 6 Pri. 480; 4 Steph. C. 66, 4th ed.).

**ANCESTOR.** The distinction made between an ancestor and a predecessor in law, is, that the former is applied to an individual in his natural capacity, as J. S. and his ancestors, and the latter to a body politic, or corporation, as a bishop and his predecessors (Co. Litt. 78 b). Wherever a prescription may be made in a man and his ancestors, it may in the case of a corporation be made in that corporation and their predecessors (1 Steph. C. 686, 4th ed.).

**ANCIENT DEMESNE.** A tenure whereby all manors belonging to the Crown in the days of Edward the Confessor and William the Conqueror were held. The numbers and names of which manors, as of

all others belonging to common persons, William the Conqueror caused to be set down in a book called Domesday; and those which appear by that book to have belonged to the Crown, and are there denominated *Terra Regis*, are called *ancient demesne*. Lands in *ancient demesne* are of a mixed nature—i. e., they partake of the properties both of copyhold and freehold; they differ from ordinary copyholds in certain privileges; and from freehold, by one peculiar feature of villenage—viz., that they cannot be conveyed by the usual common law conveyance, but pass by surrender to the lord, or his steward, and admittance thereunder, in the manner of copyholds, with the exception that, in the surrender, the words “to hold at the will of the lord” are not used, but simply the words “to hold according to the custom of the manor.” There are three kinds of tenants in ancient demesne; 1st, those whose lands are held freely by grant of the king; 2nd, those who do not hold at the will of the lord, but yet hold of a manor which is ancient demesne, and whose estates pass by surrender, or deed and admittance, and who are styled customary freeholders; 3rd, those who hold of a manor which is ancient demesne, by copy of court roll, at the will of the lord, and are styled copyholders of base tenure (1 Cru. Dig. 44; 1 St. C. 224—226, 4th ed.).

**AMENDMENTS (EQUITY).** In courts of equity, amendments are sometimes allowed to be made in the various proceedings, but the most usual amendments are in the plaintiff's bill frequently rendered neces-

sary from matter contained in the defendant's answer. One general rule is, that the amendments must not be of such a character as to entirely change the nature of the suit. As the original and amended bill are considered but as one record, formerly nothing could be introduced by way of amendment which did not take place *previously* to filing the original bill; anything occurring subsequently must have been brought before the court, either by supplemental bill, or bill of revivor (*Wray v. Hu.*, 2 M. & K. 235). It is now, however, provided, by the 15 & 16 V. c. 86, s. 53, that it shall not be necessary to exhibit any supplemental bill for the purpose only of stating or putting in issue facts or circumstances which may have occurred *after* the institution of any suit; but such facts or circumstances may be introduced (1) by way of *amendment* into the original bill of complaint in the suit, if the cause is otherwise in such a state as to allow of an amendment being made in the bill; and (2), if not, the plaintiff is to be at liberty to *state* such facts or circumstances on the record. And by Ord. of 7 Aug., 1852, pl. 44, the amendments in the second case are to be *stated*, and put in issue by filing in the Record and Writ Clerks' Office a *statement*, either written or printed, to be annexed to the bill. It has been decided that a supplemental statement cannot be filed after decree for bringing forward *new parties*, but only for the purpose of stating new matters between the *same parties* (*Commerell v. Ha.*, 18 Jur. 141; 2 W. R. 285; see *Langdale v. Gr.*, 16 Jur. 1041). With respect to the time ordinarily allowed for amending, it is to be observed



that an order for leave to amend a bill may be obtained at any time before answer, upon motion or petition, without notice (Ord. May, 1854, pl. 64). An order for leave to amend a bill, only for the purpose of rectifying some clerical error in names, dates, or sums, may be obtained at any time, upon motion or petition, without notice (Id. pl. 65). In cases where there is a sole defendant, or where, there being several defendants, they all join in the same answer, the plaintiff may, after answer, and before replication or undertaking to reply, obtain one order of course for leave to amend the bill, at any time within four weeks after the answer is deemed or found to be sufficient (Id. pl. 16, art. 32). An answer is deemed sufficient if not excepted to within six weeks (F. Bk. 286). There are provisions for the case of several defendants, and reckoning the times, in Ord. of May, 1845. The foregoing apply to *orders of course* for amendments; but, under *special* circumstances, the plaintiff may, even after replication or at the hearing (15 & 16 V. c. 86, s. 49), amend his bill, the order in such cases being obtainable (1) on special application to the judge at chambers; (2) on special application to the court (see *Clements v. Bo.*, 22 L. J. Gh. 1022). A special order for leave to amend a bill will not be granted without an affidavit to the effect (1) that the draft of the amendments has been settled, approved, and signed by counsel; (2) that such amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material for the case of the plaintiff (Ord. May, 1845, pl. 67; *Ayck. Pract.* 18 *et seq.*, 6th ed.).

#### AMENDMENTS (COMMON LAW).

The courts of common law, and the judges thereof at chambers, have always exercised the power of amending the proceedings in an action, though not so liberally but that the Legislature has thought it proper to extend the cases in which amendments should be made (*Pract. C. L.* 181—185). This was especially the case with amendments of variances at the trial, which were provided for by the 9 G. 4, c. 15, and 3 & 4 W. 4, c. 42, but these statutes (except as to inferior courts of record *Wicks v. Gr.*, 4 W. R. 253), have been superseded, or, at least, more extended powers of amendment have been given, by the C. L. P. Act, 1852, s. 222, by which the courts or any judge at chambers, or sitting at *Nisi Prius*, may, at all times, amend all defects and errors, whether there is anything in writing to amend by or not, and whatsoever may be the defect, with or without costs. And still further, that "all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties *shall* be so made" (see *May v. Fo.*, 25 L. J. Q. B. 32; *Emery v. We.*, 1 Jur. N. S. 381; *Brennan v. Ho.*, 4 W. R. 609; *Pract. C. L.* 181—185). The exercise of the discretion of a judge with reference to amendments will not be reviewed by the courts (Id.). There are also provisions with respect to the cases of non-joinder or mis-joinder of parties, as to which see *Princ. C. L.* 9, 10; *Pract. C. L.* 185; *C. L. P. Act*, 1852, ss. 34—39; 4 L. C. 27; 1 L. C. 67, 128, 418).

#### AMENDMENTS (CRIMINAL LAW).

The 9 G. 4, c. 15, and 11 & 12 V. c. 46, s. 4, provided for the amendment of variances between matter in writing or print, and the statements in indictments and informations, but the power of amendment has been greatly extended by the 14 & 15 V. c. 100, by s. 1 of which, whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be a variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, &c.; or in the name or description of any persons, &c., therein alleged to be the owner or owners of any property (real or personal) forming the subject of any offence charged therein, &c.; or in the Christian name or surname, or other description of any persons therein named or described; or in the name or description of any matter or thing therein named or described; or in the ownership of any property named or described therein; the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, may order the indictment to be amended, according to the proof, on such terms as to postponing the trial, to be had before the same or another jury, as the court shall think reasonable (Sill's C., 1 Dears C. C. R. 132; Key, Crim. L. 92, 93).

**ANNUITY.** An annual payment of a certain sum of money chargeable upon the person of the grantor (2 Bl. C. 40; F. Bk. 143). There may be an inheritance in an annuity if proper words be used with reference to the grantor and his heirs

(F. Bk. 143). It is not, however, real estate, and it cannot be entailed. When the annual sum issues out of lands it is called a rent (1 L. C. 363; F. Bk. 143).

**ANSWER.** The most usual form of defence made to the plaintiff's bill in Chancery is by the defendant's answer to the charges which the plaintiff has made against him in his bill. By 15 & 16 V. c. 86, s. 14, the answer may contain not only the answer of the defendant to the filed interrogatories, but also such statements material to his case as the defendant may think it necessary or advisable to set forth therein. Formerly the answer was in reality to the plaintiff's bill, but now the defendant is not bound to answer anything except what he is interrogated upon: a defendant may go beyond the interrogatories, and he may put in an answer though not interrogated; this is called a voluntary answer, and must be put in within twelve days from appearance (4 L. C. 13). A compulsory answer must be put in within fourteen days from delivery of a copy of the interrogatories, which times may be enlarged (Davis v. T., 5 W. R. 471; 3 L. C. 18; F. Bk. 286; 4 St. C. 43, 44, 4th ed.).

**APPARENT HEIR.** He who will succeed to the inheritance provided he outlive his ancestor: as the eldest son or his issue, who by the course of the common law must be heir to his father if he outlive him. He is called *apparent heir*, in contradistinction to *presumptive heir* (1 St. C. 387).

**APPEARANCE.** An *appearance* is

entered by a defendant at law served with a writ of summons, and by a defendant in equity served with a bill, claim, or administration summons; this *appearance* is a memorandum in writing, according to a prescribed form, delivered to the proper officer of the court, and by him *entered* in a book kept for that purpose; and this is what is technically called *entering an appearance*. At common law, the defendant has eight days to appear, the day of service of the writ being included; if no appearance be entered, and the writ was specially indorsed, the plaintiff may sign judgment (Prac. C. L. 74, 76). In equity, the defendant has eight days after service, exclusive of the day of the service. In default, the plaintiff in the case of a bill can enter an appearance for the defendant, if not under any disability (29 Ord. May, 1845; Ayckb. Pr. 48, 90, 6th ed.; F. Bk. 264, 284).

**APPELLANT.** The party by whom an *appeal* is made is called the appellant, the opposite party being termed the *respondent*.

**APPENDANT.** Annexed or appended to; as an advowson, a right of common, or a court, may be *appendant* to a manor—i.e., they are a kind of *appendage* to a manor, or land holden of a manor, so that in a grant of the manor or land they would go with it as a part and parcel of it (2 Bl. C. 22; Co. Litt. 121). Common appendant differs from common appurtenant, though they are sometimes confounded together (1 St. C. 649, 650, 4th ed.; F. Bk. 140). Many incorporeal hereditaments are capable of being either

annexed as an accessory to some hereditament corporeal, or of existing independently and *per se*; being described in the former case as appendant or appurtenant, in the latter as in gross (1 St. C. 679, 4th ed.). Lord Coke says “appendants are ever by prescription, but appurtenants may be created, in some cases, at this day” (Co. Litt. 121 b.).

**APPOINTEE.** He to whom lands, &c., are appointed or directed, by a deed of appointment, to be conveyed. The appointee is considered, for most purposes, as deriving his title under the original conveyance, and not under the deed executing the power: he is in the same position, for most purposes, as if the original conveyance had actually contained a limitation in his favour, to the extent of the estate appointed (4 Cru. Dig. 282, 497; 2 Sug. Pow. 25).

**APPOINTMENT.** A deed or conveyance so called from its *appointing* or pointing out how property which by *another* deed has been previously conveyed to trustees, is to be disposed of or settled: the appointment is not considered as an independent conveyance, but is merely ancillary to the original deed. It is very common to convey an estate to trustees upon such trusts and for such purposes as the party conveying shall thereafter by a subsequent deed *appoint*, and such subsequent deed is thence termed a deed of appointment. The power which the conveying party reserves to himself by the first deed, of appointing by such subsequent deed how the property is to be disposed of, is technically called a power of appointment, and the act of exercising this

power is termed appointing (4 Cruise's Dig. 428, ed. 1824; 2 Bl. C. 376; 1 St. C. 550, 4th ed.; F. Bk. 180). A testamentary appointment in pursuance of a power, receives the same indulgent construction as if it were a direct devise under the Wills Act (Burt. Comp. pl. 825).

**APPORTIONMENT.** The dividing into part. Thus the apportionment of rent is the dividing it according as the land from which it issues is divided among two or more; as if a man let lands, and afterwards part of them are recovered by a *strawger* (F. Bk. 145), the lessee shall pay rent, having regard to that recovered and what remains in his hands. This was the only kind of apportionment at common law, for in respect of time there was no apportionment until by the 11 G. 2, c. 19, and 4 & 5 W. 4, c. 22, provisions were made for apportionment on the death, &c., of any person interested in any rents, annuities, dividends, &c. (F. Bk. 126, 145; 3 L. C. 389; 1 L. C. 264, 265, 366).

**APPREHENSION OF OFFENDERS OUT OF ENGLAND.** By 6 & 7 V. c. 34 (amended by 16 & 17 V. c. 118), provisions are made as to the apprehension, in the United Kingdom, of persons committing treason and felony in her Majesty's dominions out of the United Kingdom; and *vice versa* as to the apprehension in those dominions of persons so offending in the United Kingdom. By 6 & 7 V. c. 75 (amended by 8 & 9 V. c. 120), provisions are also made for carrying into effect a convention entered into by her Majesty and the late King of the French

(determinable at pleasure), for the apprehension of offenders in the two countries, respectively, in cases of murder or attempts to commit murder, forgery, or fraudulent bankruptcy; and by 6 & 7 V. c. 76 (amended by 8 & 9 V. c. 120), regulations for carrying into effect a similar convention with the United States of America, in cases of murder, or attempts to commit murder; piracy; arson; robbery; forgery; or uttering forged paper.

**APPRENTICES.** Apprentices are a kind of servant, usually under age, and bound by indenture to serve for a certain number of years (commonly seven) in some trade, with a stipulation on the master's part to give instruction in his trade (F. Bk. 33, 93, 103). The 5 Eliz. c. 4 (amended by 54 G. 3, c. 96), renders it necessary that the apprentice, though an infant, should execute the indenture; but this statute has not altered the common law as to the binding force of covenants entered into by infants, at least, where the covenants are collateral covenants (Selw. N. P. 537, 11th ed.). By the custom of London, an infant may bind himself by covenant (*Ibid.*). The true consideration must be mentioned in the indentures: if not, a bill or note given for the premium is invalid (*Jackson v. Wo.*, 7 T. R. 121; *Mann v. Le.*, 10 B. & Cr. 877; *Selw. N. P.* 408, 11th ed.; see *Westlake v. Ad.*, 31 L. T. 315; 5 L. C. 84, distinguishing *Westlake v. Ad.*). Parish apprentices are the children of poor persons, and they may be apprenticed out by the overseers, with the consent of two justices, or, in metropolis, one police magistrate, in parishes not within a union; and

in the cases of unions or parishes under guardians, by the guardians without any consent of justices: the manner of doing this is regulated by various statutes (see F. Bk. 103; Oke's Mag. Syn. 806, 6th ed.).

**APPRENTICES OF THE LAW.** An order of practitioners so termed. The different orders of practitioners in the reign of Edward the First are stated by Fleta to be—*servientes, narratores, attorney et apprenticii*. The apprentices it seems were *students*, who, it is said, were first permitted by Edward I. to practise in the King's Bench, in order to qualify themselves to become in a course of years *servientes* or serjeants (2 Reeves, Eng. Law, c. 11, p. 284; 3 St. C. 367, 4th ed.).

**APPROPRIATION.** This word is used in two senses, viz., appropriation of *benefices*, and appropriation of *payments*. An appropriation of a benefice is the annexing of a benefice to the use of some religious house or spiritual corporation, whether sole or aggregate, to enjoy for ever; the same as an impropriation is the annexing a benefice to the use of a *lay* person or corporation (1 Bl. C. 385; Burt. Comp. pl. 1205). The appropriation of a *payment* means the application of a payment to the discharge of a *particular* debt. In general, a party paying money has a right to direct the application of it; but he may waive this right. Thus if a creditor has two distinct debts due to him from his debtor, and the latter makes a *general* payment on account, without specifying at the time to which account he intends the payment to apply, it is optional in the creditor to appro-

priate the payment to which account he pleases (Chit. on Contracts, 752; Waller v. La., 1 Sc. N. R. 194; Rosc. Ev. 447, 448, 9th ed.). Where the debtor intends that the payment should be appropriated to a particular account, he should notify that intention before or at the time of payment (3 B. & Cr. 357, 362, 363). In some instances the law will direct or presume the application of money paid generally (Rosc. Ev. 448).

**APPROVEMENT.** This word has two different meanings: 1. It signifies much the same as improvement: thus approvement of *common* means the *enclosing* a part of a common against common of *pasture* by the lord of the manor for the purpose of cultivating the same, leaving sufficient nevertheless for the commoners. In general, there is no right of approvement against common of *estovers* or *turbary*; the right of approvement or inclosing extends to any owner of the waste (1 St. C. 653, 4th ed.; Arlett v. El., 7 B. & C. 369; 2 L. C. 286; F. Bk. 140). 2. It signifies the act of an approver, who when indicted of treason or a felony, and arraigned for the same, confesses the fact before plea pleaded and accuses others, his accomplices, of the same crime in order to obtain his own pardon (4 Bl. C. 329; 4 St. C. 445, 461, 4th ed.; *ante*, p. 6).

**APPURTENANCES.** This term is used of those things which appertain to another thing as principal; as where a conveyance is made of a house "with the appurtenances," the garden, curtilage, and close adjoining to the house and on which

the house is built, will pass with it, as being included in the word "*appurtenances*" (2 Bl. C. 17, n. 3). Indeed, it is said that in general everything appendant or appurtenant to land will pass by any conveyance of the land itself, without being specified, and even without the use of the ordinary form "with the appurtenances" at the end of the description (Burt. Comp. 3, pl. 1145; 1 St. C. 680, 4th ed.; James v. Pl. 4 Ad. & El. 749). Hereditaments corporeal cannot be appendant or appurtenant to corporeal, nor incorporeal (generally speaking) to incorporeal (Co. Litt. 121, b. n. 7; Capel v. Bu., 6 Bing. 161).

**A PRENDRE.** An interest which is denominated a profit *à prendre*, is a right to take something out of the land of another. The following are instances of profits *à prendre*; all rights of common; the right to take coal in another man's land, not being a right to a given substratum of coal (Wilkinson v. Pr., 12 L. J. Ex. 227; 7 Jur. 284); a liberty to shoot, implying the right to appropriate the game (Wickham v. Ha., 7 M. & W. 63). The term "*à prendre*" is opposed to "*easements*," the latter including rights in the land of another, but then they do not produce any direct profit, being a mere convenience which a man may have in another's land, as rights of way, water, &c. The distinction is important with reference to the provisions of the Prescription Act, the 2 & 3 W. 4, c. 71, by which claims to profits *à prendre* are not to be defeated after *thirty* years' enjoyment, and claims of easements are not to be defeated by *twenty* years' enjoy-

ment, by showing the commencement.

**ARBITRAMENT.** The award or decision of arbitrators upon the matter of dispute which has been submitted to them (3 Bl. C. 16; 5 L. C. 113, 186). It is more usually called an *Award*, which see.

**ARBITRATION.** The submitting of matters in dispute to the judgment of two or more persons called arbitrators (3 Bl. C. 16; F. Bk. 236, 237). Arbitrations may be directed by a judge or court of common law, in cases of mere accounts. So actions brought after an agreement in writing to refer may be stayed (5 L. C. 62; 6 W. R. 606; F. Bk. 236, 237; C. L. P. Act. 1854, ss. 8—17; 1 L. C. 155—158). A submission to arbitration cannot be revoked without leave (F. Bk. 237).

**ARBITRATOR.** A disinterested person to whose judgment and decisions matters in dispute are referred. An arbitrator cannot, in the absence of an agreement, maintain an action for his fees (Verany v. Wa., 4 Esp. 47). The charges of an arbitrator, if excessive, may be reduced by the taxing master (Webb v. Wy., 3 Jur. N. S. 496; 4 L. C. 55).

**ARCHBISHOP.** The head or chief of the clergy in a whole province. He is elected by the chapter of his cathedral church (as is a bishop) by virtue of a licence from the crown: this election is in each case a mere form, the right of nominating archbishops and bishops being in the crown (3 St. C. 6, 8,

4th ed.). The archbishop has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. There are two archbishops for England and Wales; the Archbishop of Canterbury, who has within his province all the bishoprics (26) except those of Chester, Durham, Carlisle, Ripon, Manchester, and Sodor and Man; and the archbishop of York, whose province comprises the six bishoprics just named (3 St. C. 9, 4th ed.). The archbishop has his own *diocese* wherein he exercises *episcopal* jurisdiction; as in his *province* he exercises *archiepiscopal*. To him all appeals are made from inferior jurisdictions within his province; and as an appeal lies from the bishops in person to him in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court (1 Bl. C. 380, 381; exp. Dennison, 4 El. & Bl. 292).

**ARCHDEACON.** A dignitary of the church who has ecclesiastical jurisdiction immediately subordinate to the bishop throughout the whole of his diocese or in some particular part of it. He is nominally appointed by the bishop himself, and has a kind of episcopal authority originally derived from the bishop, but now independent and distinct from his. He is *oculus episcopi* and *de jure ordinario*; he *visits* the clergy, and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance (Com. Dig. Ecclesiastical Persons; 1 Bl. C. 383; F. Bk. 366; 6 & 7 W. 4, c. 77; 4 & 5 V. c. 39). As a general rule, the jurisdiction of the

archdeacon and the bishop are concurrent, so that a suit may be commenced in either (3 St. C. 18, 4th ed.).

**ARCHES COURT.** A court of appeal belonging to the Archbishop of Canterbury, the judge of which is called the *dean of the arches*, from the circumstance of his having anciently held his court in the church of Saint Mary le Bow (*Sancta Maria de Arcubus*), so called from the steeple being raised by pillars built *archwise*, like so many bent bows. The office of the judge of this court is, besides original jurisdiction on letters of request, to hear and determine *appeals* from the sentences of all inferior ecclesiastical courts within the province; this court is now holden at Doctor's Commons (3 Bl. C. 65; F. Bk. 366).

**ARGUMENTATIVENESS.** Every plea should be direct and not by way of argument or rehearsal. Pleadings are termed *argumentative* when, instead of advancing their positions of fact in a direct and absolute form, they leave them to be collected by inference or argument only, which is in violation of the rule of pleading, that "pleadings must not be argumentative" (Bac. Abr. tit. Pleas, I. 5). An argumentative plea is aided by verdict or on general demurrer (Com. Dig. Pleader, E., 3). And by the C. L. P. Act, 1852, s. 51, no pleading is to be deemed insufficient for any defect which could therefore only be objected to by special demurrer (see also C. L. P. Act, 1852, s. 50, stated under title "*Arrest of Judgment*;" also s. 52; Steph. on Pleading, 412, 4th ed.).

**ARMS, EXPORTATION.** By 16 & 17 V. c. 107, the sovereign may, by proclamation or order in council, prohibit the importation of arms, ammunition, gunpowder, &c., or their exportation (ss. 45, 150; 2 St. C. 514, 4th ed.).

**ARRAIGNMENT.** To arraign a prisoner is to call him to the bar of the court to answer the matter charged against him in an indictment (4 Bl. C. 322; F. Bk. 343).

**ARRANGEMENTS BETWEEN DEBTORS AND CREDITORS.** A trader unable to meet his engagements may petition the Court of Bankruptcy for an arrangement (deposing by affidavit that he has available property to the value of £200), and obtain protection from all process until further order, and a release from prison, if confined there for an ordinary debt; and if he afterwards makes a proposal for the payment or compromise of his debts, and at two private sittings successively held three-fifths in number and value of the creditors to the amount of £10 accept the proposal, the same (when approved by the court) is binding on all his creditors having had notice of the petition; but this does not extend to debts contracted under certain circumstances of fraud or misconduct; and if the trader fail to attend, or to file his accounts, or to obey the orders of the court, the petition may be dismissed, and if at the first sitting the proposal or any modification thereof be not assented to, or if the trader have fraudulently or improperly conducted himself in any of the various particulars set forth in the act, the court may adjudge him a bankrupt (12 & 13

V. c. 106, ss. 211—223). Also any deed or memorandum of arrangement entered into between any trader and his creditors out of court, and signed by six-sevenths in number and value of the creditors to the amount of £10 is obligatory on all the creditors; subject, however, to a proviso that it shall not bind any creditor not signing until after the expiration of three months from the time when he shall have had notice from the trader of his suspension of payment and of the deed or memorandum of arrangement, unless the Court of Bankruptcy on application (after fourteen days' notice) shall certify that the deed or memorandum of arrangement has been duly signed (12 & 13 V. c. 106, ss. 224—229; *Tettley v. Ta.*, 1 El. & Bl. 531; *Waugh v. Mi.*, 22 L. J. Ex. 109; *Drew v. Co.*, 6 Ex. R. 670).

**ARRAY** signifies the ranking or setting forth in order. Challenges to the array, as applied to juries, signifies an exception or objection against all the persons arrayed or impanelled on a jury, on account of partiality or some default of the sheriff or his officer who arrayed the panel (3 Bl. C. 259; F. Bk. 272; 3 St. C. 596; 4 Id. 488, 4th ed.). It seems that there is no challenge to the array where the jury is special (1 Arch. Chitt. 424, 8th ed.). The challenge is either by way of principal challenge, or a challenge to the favour (3 St. C. 597, 4th ed.).

**ARREST.** The legal seizure, caption, or taking of a man's person. In civil cases, no arrest can be made without the order of a judge, or, in the case of an absconding debtor (1 L. C. 8), of a bankruptcy commis-



sioner or county court judge (*ante*, 3), and then only on affidavit that the debtor is about to quit the country, and that there is a cause of action against him to the amount of £20 (F. Bk. 265; 1 Jur. N. S. 521; 2 L. C. 22; 5 L. C. 62). In *criminal* cases, a warrant is usually issued by a magistrate for the arrest of a party charged with an offence, but a peace officer may arrest without a warrant in cases of felony and breach of the peace in his own view; and a private person present at the committal of a felony must arrest the offender (F. Bk. 244, 337; 5 L. C. 394, 395; 4 L. C. 238; 4 St. C. 408, 412, 4th ed.).

**ARREST, MALICIOUS.** An action may be maintained for maliciously arresting, either on mesne or final process, either where there is not any debt due or where the party is held to bail, or sent to prison for a larger sum than is really due. The action in which the arrest took place must be shown to have been determined (*Norrish v. Ri.*, 3 Ad. & El. 733; *Selw. N. P.* 1066, 11th ed.; *Princ. C. L.* 300—303, 350—353; 3 St. C. 473, 4th ed.; F. Bk. 243; *Jennings v. F.*, 30 L. T. 54; *Churchill v. L.*, 18 Jur. 773; 4 L. C. 89, 219).

**ARREST OF JUDGMENT.** The withholding or staying of judgment, notwithstanding a verdict has been given, on the ground that there is some error appearing on the face of the record, which vitiates the proceedings (3 Bl. C. 393; *Steph. on Pleading*, 106). The non-averment of material matter is cured by the C. L. P. Act, 1852, ss. 143—145, and by s. 50, on any demurrer the court is to give judgment according to the

very right of the cause and matter in law, without regarding any imperfection, omission, defect in, or lack of form; and no judgment is to be arrested, stayed, or reversed, for any such imperfection, omission, defect in, or lack of form. The motion in arrest of judgment must be made within four days after the trial, if in term time; if in vacation, then within the first four days of the ensuing term (F. Bk. 274; 3 St. C. 632, 648, 4th ed.).

**ARREST ON INFORMATION OR COMPLAINT.** Where a written information is laid or complaint made before a justice of the peace, as for a summary conviction or for an order for the payment of money or otherwise, a summons may be issued, and if disobeyed a warrant for the apprehension of the party charged, or, in the case of a *sworn* information, a warrant may be issued in the first instance (11 & 12 V. c. 43, ss. 1 *et seq.*; F. Bk. 330; 4 St. C. 398, 399, 4th ed.).

**ARSENIC.** By the 14 & 15 V. c. 13, the sale of arsenic and arsenious preparations is subjected to restrictions, except on a regular prescription, or wholesale to retail dealers, or orders in writing in the ordinary course (*Oke's Mag. Syn.* 232, 6th ed.; 3 St. C. 307, n., 4th ed.).

**ARSON.** The crime of wilfully and maliciously burning the house or outhouse of another man (4 Bl. C. 220; 5 L. C. 202). If any person be in the house at the time, the punishment is death (1 V. c. 89; F. Bk. 317). It is a felony for a person to set fire to goods in a

house in his own occupation with intent to defraud an insurance company by burning the goods (*R. v. Sl.*, 7 W. R. 58; 14 & 15 V. c. 19, s. 8).

**ARTICLED CLERKS.** In order to enable a person to become an attorney or solicitor, he must serve under articles to a practising attorney, and thence the designation "articled clerks," who in Ireland are termed apprentices. The service must be for five years, unless the clerk be a graduate, having his degree of *bachelor* (5 L. Chron. 153) within four years previously, and then the term is three years. The instrument by which the clerk is bound is called *articles of clerkship*, and is subject to a duty of £80 (5 L. C. 204). The articles should be inrolled within six months from the execution, otherwise the service will reckon only from the time of the actual inrolment, unless the court shall otherwise order (*Pract. C. L.* 10—13; 3 L. C. 342; 4 L. C. 35, 324; 5 L. C. 205).

**ARTICLES OF THE PEACE.** Articles of the peace are the means by which a party claiming surety of the peace makes application to the Queen's Bench or Chancery or Quarter Sessions. The articles are exhibited in court and are supported by the oath of the party exhibiting them. They cannot be controverted nor will they be discharged even on the ground of insufficiency (*F. Bk.* 328; *exp. Mallinson*, 15 Jur. 746; 4 St. C. 356, 359, 4th ed.; 1 L. C. 78, 79).

**ART UNIONS.** The 9 & 10 V. c. 48, legalizes lotteries for produc-

tions of art among the members of art unions. And see 21 & 22 V. c. 102, indemnifying in respect of acts done before 31st August, 1859 (5 L. C. 157).

**ASPORTATION.** The carrying away of goods (4 Bl. C. 231). It is used chiefly in reference to larceny. To constitute larceny there must not only be a taking, but also an asportation or carrying away of the goods: a bare removal from one part of a house to another will be a sufficient asportation (*F. Bk.* 320; 4 St. C. 183, 4th ed.).

**ASSAULT AND BATTERY.** An assault is an attempt or offer with force and violence to do a corporal hurt to another, as by striking at him with or without a weapon (*F. Bk.* 243). An injury actually done to the person of a man in an angry, revengeful, or insolent manner, be it ever so small, as by spitting in his face, or any way touching him in anger, is a battery in the eye of the law; thus, every battery includes an assault; but every assault does not include a battery (3 Bl. C. 120; *Com. Dig. Battery, A.*; *F. Bk.* 243, 244; *Princ. C. L.* 298, 299). The remedy for an assault is by action; for a battery both an action and an indictment will lie; except where proceedings have been taken under the 9 G. 4, c. 31, followed by a conviction or a dismissal with a certificate (*Princ. C. L.* 298, 299; *F. Bk.* 243, 244).

**ASSEMBLY, UNLAWFUL,** is ordinarily defined to be the meeting of three or more persons with the intention of doing (though without actually accomplishing) an unlawful

act (4 Bl. C. 146); but this seems too narrow a definition; for any meeting by great numbers of persons, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the Queen's subjects is an unlawful assembly (see Dick. Sess. 4th ed. 429; 4 St. C. 320, 4th ed.; see also 57 G. 3, c. 19, s. 23; F. Bk. 308).

**ASSESSED TAXES.** These comprise the duties on inhabited houses (in lieu of window duty), servants, carriages, horses and mules, dogs, horse-dealers, hair powder, armorial bearings, and game (2 St. C. 581, 4th ed.).

**ASSETS.** Assets are either legal or equitable, personal or real. In general by assets is meant legal assets (24 L. J. C. P. 196). Assets coming to the hands of the executor *virtute officii* are legal assets (3 L. C. 314; 28 L. T. 365). Personal assets comprise personal property of a saleable nature in the hands of the executor or administrator, and which is then said to be sufficient or enough (*assez*) to make him chargeable to a creditor or legatee, so far as that personal property will extend. Assets by descent or real, are lands which are in the hands of the heir or devisee, charged by common law and by statute with the payment of debts contracted by the ancestor or deviser, so far as such lands can go in the discharge of those debts; thus, when a man has bound himself and his heirs in any obligation in writing with the payment of a certain sum, and he dies seised of, or equitably entitled to, lands in fee-simple, which descend to his heir,

or devises them, these lands, when in the hands of the heir or devisee, will be liable to the payment of that sum (2 Bl. C. 510). This has since been extended in equity to specialties not binding the heir, and to mere simple contract debts; but the heir-binding specialty has a preference (3 & 4 W. 4, c. 104). It must be borne in mind, that if a man, by his will, charge his real estates with the payment of his debts, all his creditors are equally entitled, whether by specialty or by simple contract, in equity, for there "equality is equity" (7 Ves. 319; 1 St. C. 425—428, 4th ed.; F. Bk. 231; 3 L. C. 314).

**ASSIGN.** This word is frequently used synonymously with *assignee*, meaning any one to whom property is assigned.

**ASSIGNEE.** When any right, title, or property of a leasehold nature is assigned or made over to another, the party who assigns or makes it over is termed the assignor, and he to whom it is assigned is termed the assignee (F. Bk. 174); but sometimes the term is applied to the case of an interest of a freehold nature, especially reversions and remainders; and this is the meaning which the word assigns has in deeds and instruments; for instance, when A. in a deed covenants for himself, his executors, administrators, and assigns, the word assigns means any person to whom the property or interest contained in the deed may happen at any future time to be assigned. On the assignment of a lease the assignee stands in the place of the assignor. The assignee's liability on the covenants, however, is limited to such as run with the land, and to

the time during which he continues to be assignee (1 St. C. 527, 4th ed.; F. Bk. 174). An equitable assignee of a lease is not liable unless he has entered into possession under the title of the original lessee (Cox v. Bi., 5 W. R. 437; 3 L. C. 315, 370; 4 L. C. 19). At law no entry is requisite to make the assignee liable.

**ASSIGNEES OF BANKRUPT:** Persons in whom the estate and effects of a bankrupt become vested as trustees for the general creditors of such bankrupt. Assignees of a bankrupt are of two kinds—viz., *official* and *creditors'* assignees. *Official assignees* are persons holding permanent appointments under government as such, and who exercise no other calling or profession. *Creditors' assignees* are persons (usually, though not necessarily, creditors of the bankrupt) selected by the creditors of the bankrupt to be trustees of the estate and effects of the bankrupt for the benefit of the creditors generally. Formerly, the assignees had no title whatever to the bankrupt's property, real or personal, until an assignment of the same had been actually executed; but by the 12 & 13 V. c. 106 (re-enacting the 1 & 2 W. 4, c. 56, ss. 25), the personal estate and effects of the bankrupt become vested in the assignees by virtue of their appointment, and the real estate of the bankrupt vests absolutely in the assignees by virtue of their appointment, without any deed of conveyance for that purpose. Some kinds of rights and property do not pass to the assignees; as rights of action for merely personal wrongs, property belonging to the bankrupt in the capacity of trustee

for others, offices which he holds of such a nature that they cannot be legally sold; the right of nomination to any vacant ecclesiastical benefice, military pay under the Crown and military pension under the East India Company. And some kinds of property, though the assignees be entitled thereto, do not *vest* as above mentioned, as estates tail and copyhold, lands subject to a perpetual rent, and contracts to purchase land and leases, which it is at the election of the assignees either to accept or renounce (12 & 13 V. c. 106, ss. 145, 146, 147; F. Bk. 218, 219).

**ASSIGNMENT.** This term, in its general sense, denotes the making or transferring over by one of all his interest in a subject-matter to another, and in some cases a deed is requisite. The term, when used as to actual estates in lands and tenements, is confined to life estates and leasehold interests. In such cases (except as to copyholds) a deed is requisite (8 & 9 V. c. 106, s. 3). A deed is also required for the assignment of a patent right, and so of a copyright, where not entered at Stationers' Hall (Simms v. Ma., 20 L. J. Q. B. 454); but, in general, no deed is required for the assignment of chattels personal, nor even a writing, except where required by statute, as in the case of the transfer of ships, or shares therein (17 & 18 V. c. 104, s. 55; 18 & 19 V. c. 91, s. 11), of bills or notes payable to the order of a particular person (2 St. C. 49, 4th ed.), &c. Some things cannot be assigned, as the pay or half-pay of a military or naval officer, or the salary of an officer of trust, public offices of trust (2 St. C. 44, 4th ed.; F. Bk. 142; 11 Jur. pt. 2, pp. 353,

354), and, at law, choses in action, except bills, notes, bills of lading, and certain other statutory exceptions (Bac. Abr. Assignment, F. Bk. 197; 2 Jur. N. S. 933; as to the necessity of notice or stop order see F. Bk. 198; 2 L. C. 75—78, 324; 3 Id. 37, 153, 256). By the 8 & 9 V. c. 106, s. 6, contingent, executory, and future interests and possibilities coupled with an interest in real estate and rights of entry therein, immediate or future, may be assigned by deed: but this does not extend to expectancies under unexecuted instruments or the wills of living persons or to the hope of succession of an heir or next-of-kin (Brow. Stats. 277; King v. Ba., 3 My. & Ke. 417). A personal trust cannot be assigned over such as the office of trustee, guardian, &c. (Bac. Abr. Assignment).

**ASSIZES.** This word is applied to the sittings of the judges at the various places which they visit on their circuits twice in every year in the respective vacations after Hilary and Trinity terms, the former of which are commonly called the *spring* assizes, the latter the *summer* assizes. There is now usually a third circuit appointed in the course of the year for the trial of criminals, called a *winter* assize. In London and Middlesex, which are not comprised in the circuits, the sittings are termed courts of *nisi prius* only and not of assize. These sittings are in and after every term.

**ASSUMPSIT.** This word is ordinarily used in two senses; 1st, to signify a *promise* (assumpsit) or undertaking; 2ndly, the form of action to recover damages for the

breach of a promise or undertaking not under seal. In this latter sense it may be defined to be an action for the recovery of damages for the non-performance of a parol or simple contract—i. e., a promise not under seal. It is usually treated as an independent form of action though formerly considered merely as a species of the action of trespass on the case, the words “on promises” being added. The point is not so important as formerly, the form of action not now being mentioned (F. Bk. 238, 240). The action is so called from the word *assumpsit*, which, when law pleadings were framed in Latin, was always inserted in the declaration as descriptive of the defendant's undertaking. It is not necessary to sustain this action that there should have been a breach of an actual or express promise, inasmuch as the law always implies a promise to do that which a party is legally bound to perform, and the breach or violation of such implied promise is sufficient to support the action. There were two species of *assumpsit*; the general *indebitatus assumpsit*, and the special *assumpsit*; the former comprises the ordinary claims for goods, work, money, and account. stated (1 Chit. Plead., 98; Steph. Plead. 19; 3 Bl. C. 158; F. Bk. 240; 3 St. C. 520, 4th ed.; Selw. N. P. 68, 4th ed.).

**ASSURANCE.** This word signifies a deed of conveyance *inter vivos*. There are also assurances by matter of record, but the word is usually considered to refer to conveyances. All deeds that are used for the purpose of conveying property from one party to another are

termed assurances, because they are the means of assuring the property so conveyed.

**ATTACH.** To attach means to take, or apprehend by command of a judicial writ termed an attachment. It is a mode of punishment usually resorted to in cases of contempt of court; as when a man openly insults or resists the process of the courts, or the judges who preside there; or when a man does any act, or omits to do any act, which shows his disregard of the authority of the courts (4 Bl. C. 283; 3 St. C. 356, 364, 605, 696; 4 Id. 49, 4th ed.; F. Bk. 335). Every court of record has authority to fine and imprison for contempt of its authority (Bac. Abr. Courts, E.; Miller v. Kn., 4 B. N. C. 574). County courts are not courts of record, but provision has been made for contempts by 9 & 10 V. c. 95, s. 113; 12 & 13 V. c. 101, s. 2; Levy v. Mo., 1 L. & P. 307).

**ATTACHMENT FOR CONTEMPT (EQUITY).** This is a writ issuing out of the Court of Chancery directed to the sheriff or other officer of the county or jurisdiction within which the party against whom it issues resides, commanding him to attach the defendant so as to have him before the court on a particular day therein mentioned to answer his *contempt*. The writ is one of the series which issues in cases of contempt whether actual or constructive. The form of the writ is the same, whether it be for the want of appearance or answer, or for non-compliance with a decree or order, but the indorsement expresses the object of it. Where

it issues for want of appeasance or answer, the sheriff may take bail, but not in other cases. After the party is taken, he must, within a limited period, be brought to the bar of the court and turned over to the Queen's Prison (Ayckb. Pract. pt. 1, ch. 2). It is not necessary in all cases to have recourse to an attachment: thus, on non-appearance by a defendant under no disability to a bill duly served, the plaintiff may appear for such defendant (F. Bk. 284); and on a decree or order for the payment of money or costs, a *fi. facias* or *elegit* may be issued (F. Bk. 289; 2 L. C. 194; 3 Id. 391; 4 Id. 88).

**ATTACHMENT FOR CONTEMPT (COMMON LAW).** This is a writ issuing out of the common law courts to enforce obedience to a rule of court. A mere order of a judge cannot be so enforced, unless made a rule of court (Baker v. Ry., 1 Dowl. 689). Before the attachment can issue, there must, in general, be a personal service of the rule, and if for payment of costs, the allocatur of the master, the original rule being shown (Burkit v. Ho., 4 Dowl. 566). A demand of that which is ordered by the rule must be personally made upon the party who is to perform it, unless the party by violence, &c., has prevented such a demand being made (Wenham v. Do., 3 Dowl. 573; Doe v. Ball, 15 L. J. Q. B. 220). There must be rules *nisi* and absolute for the attachment, except (1) for payment of costs as between party and party (and not as between attorney and client) on any allocatur; (2) against the sheriff for not

obeying a rule to return a writ or to bring in the body; (8) for contempt of court in the execution of the process of the court: in these three cases the rule is *absolute* in the first instance (*Richmond v. Bo.*, 1 M. & W. 40). In attachments for non-payment of money or costs, the party cannot be bailed but remains in custody till he pays the amount; in other cases of contempt, the party must be brought into court or before a judge at chambers, at the return of the writ, and be sworn to answer interrogatories, but the judge may release him on a recognisance with sureties. The interrogatories being exhibited, the party is examined thereon before a master, who makes his report to the court (F. Bk. 335).

**ATTACHMENT (FOREIGN):** Is a peculiar and ancient remedy open to creditors within the jurisdiction of the city of London, Exeter, and some other ancient cities, by which they are enabled to satisfy their own debts by *attaching* or seizing the money or goods of their debtor in the hands of a stranger or third party within the jurisdiction of such city. Thus supposing A. to owe B. ten pounds, and C. to owe A. a sum of money, B. may, by this process, take or attach the moneys, &c., of A. in the hands of C. to satisfy himself (see Pulling's Laws and Customs of the City and Port of London, 187; 1 Camp. 282; *M'Grath v. Ha.*, 4 Bing. N. C. 785, where statement of the proceedings in foreign attachment will be found; 3 St. C. 663, n. 4th ed.; 21 L. J. Q. B. 377).

**ATTAINER.** Attainder is the result of a *judgment* (not merely of

a conviction as is sometimes stated) of *death*, or its equivalent judgment of outlawry on a capital crime. It extends therefore to treasons and felonies of a capital nature. It involves in certain of these cases, viz., treason and murder, corruption of blood so as to prevent the descent of land to the offender or any one claiming under him, except as mitigated by statute, and also the penalties of forfeiture and escheat. The doctrine of corruption of blood, whereby the person attainted was not only incapable himself of inheriting, or transmitting his own property by heirship, but also obstructed the descent of real estate to his posterity where they were obliged to derive their title through him from any remoter ancestor, has been modified by statutory enactment. Thus, by the 54 G. 3, c. 145, no attainder, except for *treason* or *murder*, extends to the disinheriting of any person, nor to the prejudice of the right or title of other persons than the offender, during his life only; and that every person to whom the right or interest of any real estate would have appertained if no such attainder had taken place, may enter into the same. By the 3 & 4 W. 4, c. 106 (in cases of escheats after 1833), when any person, from whom the descent of any land is to be traced, shall have had any relation, who having been attainted, shall have *died before* such descent shall have taken place, such attainder is not to prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation, if he had not been attainted. By the 13 & 14 V. c. 60,

re-enacting the 4 & 5 W. 4, c. 23, no trust or mortgage lands, stock, or chose in action or any profits thereof, are escheated or forfeited on the attainder or conviction for any offence of the trustee or mortgagee thereof (F. Bk. 160, 161, 201, 350; 4 St. C. 62, 234, 522; 1 St. C. 200, 210, 357, 4th ed.). With respect to real estates, then, there is no forfeiture beyond the criminal's life, except for treason and murder. As to treason, the criminal on attainder forfeits to the crown (without any right of escheat to the lord, as in the case of murder) all his freehold lands of inheritance and rights of entry thereon, and also all his estates for life or years in freehold estates. This forfeiture relates back to the time of the committal of the treason. As to murder, the profits of the freehold lands of the offender are on attainder forfeited to the crown for life, and in addition, as to lands in fee simple (but not in tail), for a year and a day; and afterwards they escheat to the lord of the fee. The forfeiture relates back to the commission of the murder (1 St. C. 439, 4th ed.). In other felonies than murder, the offender on attainder forfeits to the crown the profits of all estates of freehold during life, but there is no escheat to the lord. This forfeit re also relates back to the committal of the offence (16 Jur. 517; 20 L. T. 148). Copyhold estates, in cases of treason or felony, are forfeited to the lord of the manor, and not to the crown, unless by the express words of an act of Parliament (4 St. C. 519, 4th ed.; 5 B. & Ad. 254; 2 Abr. Prest. 2; 5 B. & C. 515). Gavelkind lands are not subject to escheat for felony, though they are liable to

forfeiture for treason (1 St. C. 440, 4th ed.; as to *office found*, see Doe v. Pr., 5 B. & Ad. 765; Burt. Comp. pl. 189, note). The forfeiture of goods and chattels has no necessary connexion with attainder; for they are forfeited by conviction merely; such a forfeiture accrues not only in treason and murder, but in all felonies; but there is no relation back to the committal of the offence (4 St. C. 524—526, 4th ed.; 19 L. T. 157; F. Bk. 351).

ATTACHMENT OF DEBTS. — By the C. L. P. Act, 1854, a remedy somewhat similar to that of foreign attachment is given (except that no writ is actually issued), by enabling a judgment creditor to attach debts due to his judgment debtor from third persons, and have execution against such person, who is called the *garnishee* (ss. 60—67; 1 L. C. 160, 161; F. Bk. 278; 3 L. C. 158, 325, 379; Dingley v. R. 26 L. J. Ex. 55). The course of proceeding is for the judgment creditor to apply to a judge at chambers for an order that all debts owing by any third person (who is called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt. And in order to discover the existence and amount of such debts, any creditor may apply to have him orally examined as to any and what debts are owing to him. The order of attachment, when obtained, must be served on, or notice thereof given to, the garnishee; this service binds such debts in his hands without any writ being issued. He may then be ordered to appear before a judge or a master of the court to show cause why he should not pay the judg-



ment creditor the debt due from him to the judgment debtor; and if he does not dispute the debt due from him to the judgment debtor, he ought to pay the amount into court; for if he fails to do so, or to appear to the summons, execution may be sued out against him, without any previous writ or process. If the garnishee disputes his liability he must appear upon the summons and do so, and the judgment creditor may then proceed against him by a writ, in the nature of a writ of summons, calling upon him to show cause why there should not be execution against him for the amount due to the judgment debtor and the costs of suit. To this writ he must appear and plead as in an ordinary action, or suffer judgment by default. Payment made by, or execution levied upon the garnishee, is a valid discharge to him, as against the judgment debtor, to the amount paid or levied (C. L. P. Act, 1854, ss. 61—67; *Westoby v. Da.*, 22 L. J. Q. B. 418; *Holmes v. Ta.*, 24 L. J. Q. B. 346; *Johnson v. Di.*, 24 L. J. Ex. 217; F. Book. 278; 1 L. C. 160, 161; 3 L. C. 158, 325, 379; 4 L. C. 87, 198, 419; 5 L. C. 63, 136; *Winte v. Wi.*, 27 L. J. Ex. 311).

**ATTENDANT TERMS.** All terms of years are originally in gross, but capable of becoming by the satisfaction or accomplishment of the purpose for which they were created attendant upon the inheritance, in which case they were, until the 8 & 9 V. c. 112, dealt with by the owners as protections to their inheritances. To explain this, let it be supposed that A., the owner of the inheritance, mortgaged to B.

for 1000 years, and that A. afterwards paid off the mortgage, but, instead of procuring a surrender of the term, caused it to be assigned to a trustee to attend the inheritance, or directed that the satisfied mortgagee should hold it upon trust to attend, or omitted to deal with it at all, in which last case the benefit of the term would result to the owner of the inheritance, on which it would attend by construction of equity. In this state of things, there was said to be an equitable incorporation of the term with the inheritance, and A. had an absolute and undivided ownership of the whole interest in the fee simple, including and involving the beneficial interest in the term. Then suppose A. settled the inheritance on his marriage, limiting terms of years, life estates, and remainders. Now, the attendant trust of the term was held to adapt and accommodate itself to all the interests created by the settlement, every one of which would, in its order, degree, or proportion, have had a commensurate interest in the term. The term was, therefore, held to be still attendant. The equitable incorporation remained undisturbed. Let it be now supposed that A., being tenant for life under the settlement, and, as such, retaining the deeds, assumed to sell and convey the inheritance to a purchaser, who bought without notice of the settlement, and procured the term to be assigned to his nominee, upon trust, in the usual form, to attend the inheritance. Here the dismemberment of the equitable inheritance began; the term was said to be disunited from that inheritance; and in the very

instant in which it was directed to attend, ceased to sustain the character of an attendant term; for, if it were really attendant on the inheritance, the persons claiming under the settlement, and not the purchaser, would have been entitled to the benefit of it, according to the order, degree, and proportion of their respective interests. But the purchaser, by "getting in" the term, was held, to the extent of the legal ownership which it conferred, to have excluded the inheritance. To defend a purchaser or mortgagee without notice (at the time of the purchase or loan), was the object generally proposed to be attained by taking an assignment of a term, but in the peculiar case of dower notice was immaterial (*Maundrell v. Ma.*, 7 Ves. 567; 10 Ves. 246; *Hay. Conc. Conv.* 86—88, note). But whether the term was to be used as a protection against dower, or any other adverse interest, the purchaser must have dealt with the term, and appropriated it to himself; for, if he allowed it to remain unnoticed in the trustee, in whom at the period of his purchase, it was vested, upon trust to attend the inheritance, it would continue to adhere to the inheritance, and of course strengthened the *adverse* interest. The purchaser must have dissolved the connection; he must have rendered the term wholly or partially non-attendant. By the 8 & 9 V. c. 112, the practice of assigning satisfied terms is, if not wholly put an end to, rendered unnecessary in most cases, it being provided that such satisfied terms of years as should, either by express declaration or by construction of law, on the 31st of December, 1845,

be attendant upon the inheritance or reversion of any lands, should on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof they should be so attendant; with a proviso, however, that every such term of years made so attendant by express declaration (although thereby made to cease and determine), should afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded him if it had continued to subsist, but had not been assigned or dealt with after the 31st of December, 1845, and should for the purpose of such protection be considered in every court of law and of equity to be a subsisting term. And with respect to terms of years (then subsisting or thereafter to be created) becoming satisfied *after* the 31st of December, 1845, that such as should, either by express declaration or by construction of law, after that day become attendant upon the inheritance or reversion of any lands should, immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such terms should become so attendant. It would, therefore, appear that in no case can the real owner of the inheritance require the assignment of a satisfied term, but as the act does not abolish *all* satisfied terms, but only such as are by express declaration or construction of law attendant upon the inheritance, if a term is not in either predicament, a party getting it in, without notice, may use it *against the fee* (see *Doe d.*

Clay v. Jones, 13 Jur. 824; Doe v. Price, 16 M. & W. 608; Doe v. Phillips, 11 Jur. 692; Horsey's Purch. Deeds, 97, 98; Dart's Vend. 380, 331, 3rd ed.; Sugd. Stats. 292, 294; 1 L. C. 410, 411; 4 Id. 196).

**ATTESTATION OF DEED.** The attestation of a deed signifies the testifying or witnessing the signing and sealing of it. The formal clause "signed, sealed, and delivered, &c.," together with the witnesses' names, is also sometimes called the attestation. No attestation is essential to a deed, except where it is executed in pursuance of a power requiring such ceremony, and then the terms of the power must be strictly complied with. Attestation is required for the purpose of registering deeds.

**ATTESTATION OF WARRANTS OF ATTORNEY AND COGNOVITS.** By the 1 & 2 Vict. c. 110, s. 9, no warrant of attorney in a *personal* action or cognovit shall be of any force unless there be present an attorney on behalf of the person giving it, expressly named by him, and attending at his request to inform him of the nature thereof, which attorney is to subscribe his name as a witness to the due execution of such warrant or cognovit, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney. The attorney acting for the plaintiff cannot act also for the defendant on the execution of the warrant or cognovit (Hirst v. Ha., 17 Q. B. 383; 1 L. C. 51, 130, 435).

**ATTESTATION OF WILL.**—Prior

to the Wills Act (1 V. c. 26) the execution of a will of freehold lands must have been attested by at least *three* witnesses, whilst a will of copyholds and personalty, in general, required no attesting witnesses. The attestation of a will of lands must have been by the witnesses in the presence of the testator, but it was not requisite that the witnesses should attest in the presence of each other, or that one should be seen by another. It was sufficient if the testator acknowledged his signature or his will at three several times to different witnesses who attested in his presence (Shelf. Wills. 40, 43: 11 Jarm. Conv. 54, 3rd ed.). The Wills Act requires the signature to every will to be made or acknowledged by the testator in the presence of *two* witnesses present at the same time, and such witnesses must attest and subscribe the will in the presence of the testator, but no *form* of attestation is requisite (F. Bk. 190; 1 L. C. 266, 424, 378; 3 Id. 92). But it is desirable that there should be a form for probate purposes. The following is the form given in 11 Jarm. Conv. 3rd ed. p. 928: "Signed by the said testator as his last will and testament, in the presence of us, present at the same time, who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses." In the "Instructions" issued by the Probate Court it is directed that the registrars, if there be no attestation clause, or one not declaring that all the requisitions of the Wills Act have been complied with, shall require an affidavit from one at least of the witnesses to prove that the provisions of the act, as to ex-

ecution, are satisfied, which affidavit is to be engrossed with and form part of the probate. If the affidavits are not sufficient, then probate will be refused, and if they raise doubts, the registrars may require the matter to be brought before the judge on motion. Should the witnesses be dead, or from other circumstances an affidavit cannot be obtained from either of them, resort may be had to other persons (if any) who were present at the execution of the will, but if that be proved by affidavit to be not obtainable, then evidence is to be given of the handwriting of the witnesses, and also of any circumstances which may raise a presumption of due execution (Horsey's Prob. 136, 2nd edit.)

**ATTESTING WITNESS.** He who attests or witnesses the execution of a deed or other instrument. Formerly, where there was an attesting witness to a document (not being a mere notice, 3 Jur. 23), he must have been called to prove its execution; but now, by C. L. P. Act, 1854, s. 26, it is not necessary to prove by the attesting witnesses any document to the validity of which attestation is not requisite (*Roden v. Ry.*, 4 Q. B. 626; 1 L. C. 158, 435; F. Bk. 272).

**ATTESTING WITNESSES (EVIDENCE).** Formerly, where a document was given in evidence which was attested by witnesses, one at least of those witnesses must have been called, unless the document were thirty years old, and came out of the proper custody; though if the witnesses were dead, secondary evidence by proof of the

handwriting of one of them was admissible. But now by the C. L. P. Act, 1854, s. 26, it is not necessary to call an attesting witness to any instrument to the validity of which attestation is not necessary (3 St. C. 614, 615, 4th ed.; F. Bk. 272; 1 L. C. 158, 435; 4 L. C. 9, 313, 401, 412). The most ordinary instruments to which attestation is essential are wills, and appointments under powers requiring such attestation, and it is to be remarked that no admission of a party to an action in or out of court (except a formal admission *inter partes* for the purpose of the trial) can be safely relied on as dispensing with the production of the attesting witnesses of an instrument to which attestation is necessary (*Whyman v. Ga.*, 22 L. J. Ex. 316; *Rosc. Ev.* 116, 9th ed.; 3 St. C. 615, 4th ed.).

**ATTORNEY.** One who is put in the place or stead of another to act for him. There are two kinds of attorneys, one who acts in a private capacity and is simply called an attorney while his authority to act for such other party is in existence; the other who acts in a public capacity as an officer of courts at Westminster (in the courts of equity, the party is termed a solicitor, hence the distinction is, an attorney of the common law courts and a solicitor of the Court of Chancery, though the terms are frequently used indiscriminately), and is called an *attorney-at-law*, and whose duty consists in transacting and superintending the legal business of his clients, as in prosecuting and defending actions at law, in furnishing his clients with legal advice, and in performing

various other important matters connected with the practice of the law (3 Bl. C. 25; 3 St. C. 307, 365, 371 n., 4th ed.; F. Bk. 365; 1 L. C. 361; 3 Id. 263, 404; Pract. C. L. 9, 54; Princ. C. L. 75—86). Any one (even an infant, married woman, &c., Com. Dig. Attorney, C. 4) may be a private attorney, but not every one can appoint such an attorney (*Graham v. Ja.*, 9 Jur. 275). The appointment is revoked by the death of the appointor, and may be in his lifetime, unless given for valuable consideration (*Dart's Vend.* 206, 366, 3rd ed.). No one can act as a public attorney or solicitor unless admitted in the courts, and taking out an annual certificate (F. Bk. 365). The death of either the client or the attorney is a revocation of the retainer (Princ. C. L. 82).

**ATTORNEY-GENERAL.** A high law officer of the state, who receives his appointment by letters patent, and is selected from her Majesty's counsel; his office is to prosecute criminal matters for the Crown, exhibit informations, and transact general business, for which he receives a standing salary (3 Bl. C. 27). He is entitled to *pre-audience* (3 St. C. 368 n., 4th ed.). Informations and proceedings in charity cases must be taken in his name (3 St. C. 190). And so informations at law in the nature of a *quo warranto* are filed in the Court of Queen's Bench by the Attorney-General in the cases of the usurpations of offices, franchises, or liberties (F. Bk. 257). The criminal informations filed *ex officio* by the Attorney-General are usually for misdemeanors tending to disturb or endanger the Government, &c. (F. Bk. 341; 4 St. C. 441, 4th ed.).

**ATTORNMENT:** Formerly a tenant's acknowledgment of a new lord on the alienation of lands by the former lord. It is of feudal origin, for by the feudal law the feudatory could not alien or dispose of the feud without the consent of the lord, nor the lord alien or transfer his seignory without the consent of his feudatory (2 Bl. C. 288, 290). And until the 4 A. c. 16, s. 9, on the transfer of a remainder or reversion, an attornment by the tenant in possession was requisite, but by that statute it is rendered unnecessary (*Burt. pl.* 41, 1097—1101). Until notice the tenant will be justified in paying his rent to the transferee. An instrument operating as an attornment only requires no stamp (*Doe v. Ed.*, 6 N. & M. 633; 4 Jur. 626; 5 L. C. 111, 186). The attornment by a tenant in possession is evidence of the seisin of the party to whom it is made (*Doe v. Ed.*, 5 Ad. & E. 95).

**AUDITA QUERELA.** A writ which lies for a defendant, against whom judgment has been recovered, and who is therefore in danger of having execution issued against him, to relieve or discharge him upon showing some good ground for discharge which has arisen since the recovery of such judgment, such as a release or other circumstance which would discharge the defendant (*Will. Plead.* 213; Com. Dig. "*Audita Querela*," 1 Ex. 59, 701; 4 Ex. 82). Leave of the court or of a judge is necessary before the writ issues (*R. G. H. T.*, 1853, pl. 79). Equitable defences too late to be pleaded may be set up by *audita querela* (C. L. P. Act, 1854, s. 84; C. L. Pract. 222).

**AUTRE DROIT** (*another's right*).

When a person holds an estate not in his own right, but in the right of another, he is said to hold it *en autre droit*. Thus, if a tenant for years die, the term, being personal property, vests in his executor, who in such case would have the term *en autre droit*, or in the right of his testator, and subject to his debts and legacies (2 Bl. C. 176, 177). A very common case in which the term is applied, is that relating to the doctrine of merger, which arises where two estates come immediately to one and the same person in one and the same right; if the freehold be in the party's own right, and the term in right of another (*en autre droit*), there is no merger (1 St. C. 317, 4th ed.).

**AUTRE FOIS ACQUIT.** The name of a plea pleaded by a criminal; signifying that he has been formerly acquitted on an indictment for the same offence; it being a maxim of the common law of England, that no man is to be put in jeopardy more than once for the same offence (4 Bl. C. 335; 8 Jur. 887; 4 St. C. 468, 4th ed.; F. Bk. 344). If the indictment on which the acquittal was had was substantially erroneous, it is no bar. The crimes must also, in general, be identical (4 St. C. 469, 4th ed.; 2 Jur. N. S. 1146; F. Bk. 344; 3 L. C. 229, 339; Reg. v. Bird, 20 L. J. M. C. 70).

**AUTRE FOIS ATTAINT.** A plea by a criminal, that he has been before attainted for the same offence (7 & 8 Geo. 4, c. 28, s. 4). For wherever a man is attainted of felony by judgment of death, either upon a verdict or confession, or

by outlawry, he may plead such attainder in bar to any subsequent indictment for the same felony. The reason of this is, that any proceeding on a second prosecution cannot be to any purpose, as the prisoner was dead in law by the first attainder, his blood was already corrupted, and he had forfeited all that he had (4 Bl. C. 336; 4 St. C. 470, 471, 4th ed.; F. Bk. 344).

**AUTRE FOIS CONVICT.** A plea by a criminal that he has been before convicted of the same identical crime (4 Bl. C. 336; 4 St. C. 470, 4th ed.; F. Bk. 344).

**AUTRE VIE** (*the life of another*). When a person holds an estate during another man's life, or so long as such a man shall live, he is called a tenant *pur autre vie* (2 Bl. C. 120; Litt. s. 56; 1 St. C. 255, 4th ed.; F. Bk. 125; Allen v. Al., 2 Dr. & W. 307).

**AVERAGE.** This word, in maritime matters, is used for the contribution made by the owners of a ship and the proprietors of goods on board, to those persons who, for the preservation of the ship, and of the goods and lives on board, have sacrificed their own property by casting it into the sea. It is called average because the contribution is proportioned and allotted after the rate and according to the value of each man's goods so preserved on board. Average is termed either *general* or *gross*—or, *small*, *petty*, or *accustomed*. General or gross average means the contribution which the owners of the ship and of the goods saved, and also the parties entitled to the freight (Selw. N. P.

949, 11th ed.; *Moran v. Jo.*, 26 L. J. Q. B. 187), contribute for the relief of those whose goods are thrown over-board, so that all who profited by the lightening of the ship may bear a proportionable loss of the goods thus thrown overboard for the common safety. It is said that all loss which arises in consequence of extraordinary sacrifices or expenses, incurred for the preservation of the ship and cargo, come within the description of general or gross average. It is essential that the ship should be eventually saved; and that the sacrifice so made should have, in fact, conduced to her preservation; and, also, that any part of the cargo so thrown overboard should have been laden at the time in a proper and usual manner (*Gould v. Ol.*, 4 B. N. C. 134; 2 St. C. 132, 4th ed.; *Hall v. Ja.*, 4 El. & Bl. 500). Not only the ship and cargo, but also the *freight*, is liable to contribute to a general average; and the way of settling the contributions among the several parties, on the arrival of the ship at the port of destination, is to ascertain the proportion that the value of the property sacrificed bears to the entire value of the whole ship, cargo, and freight (such estimate being made according to the net value of the several articles, if there brought to sale), and to make the property of each owner (including the property sacrificed) contribute to the common loss, in the proportion so found. A party obliged to make a payment of such quota to the owner of the property sacrificed, is entitled to seek compensation from the underwriters with whom he may have effected an insurance upon the property liable to the contribution (2 St. C. 133,

4th ed.; *Abb. Ship.* 348, 3rd ed.). Small, petty, or accustomed average consists in such charges and disbursements as, according to occurrences and the custom of every place, the master necessarily furnishes for the benefit of the ship and cargo, either at the place of loading or unloading, or on the voyage; such as the hire of a pilot for conducting a vessel from one place to another; towage, light money, beaconage, anchorage, bridge toll, quarantine, and such like (5 Bac. Abr. 428; 1 Park. on Insur. 161, ed. 1817). Sometimes the term particular average is used in contradistinction to general average, intended to denote every kind of partial loss happening either to the ship or cargo from any cause whatever; but it is said to be a very incorrect expression (5 Bac. Abr. 428, 7th ed., citing *Abbott on Shipping*, 272; but see 27 L. J. Ex. 105).

**AVERMENT.** An allegation in pleading is so termed. It also signifies an offer of the defendant in an action to make good or justify an exception pleaded in abatement or bar of the plaintiff's action: and it signifies the act as well as the offer of justifying the exception, and not only the form, but the matter thereof (3 Bl. C. 312). There have been some provisions made by the C. L. P. Act, 1852, ss. 57 and 61, and R. G. T. T., 1853, pl. 9; as to the form of making averments, and in the cases of slander or libel, dispensing with prefatory averments (*Pract. C. L.* 117, 118).

**AVOW AND AVOWRY.** See p. 13.

**AVOWTERER.** An adulterer; and

the crime is hence sometimes called *avowtry* (*ante*, p. 12).

**AWARD.** An award is the judgment or decision of arbitrators, appointed as mentioned *ante*, p. 23 (see fuller definition, 5 L. C. 77, 118). If there be two or more arbitrators, they should execute their award at the same time and place (3 L. C. 306). As to an award by an *umpire*, see 5 L. C. 90, 91. There are four modes of enforcing an award—namely, 1. by attachment; 2. by execution; *sed quere*, as to attachments and executions on a *compulsory* reference (Talbot v. Fi., 2 C. B. N. S. 471); 3. by action; 4. by judgment and execution, on a *compulsory* reference, or where the cause, being referred at *Nisi Prius*, a verdict is taken subject to an award, and then the judgment is signed on the *postea*, and not on the award (3 L. C. 282; F. Bk. 297; Key, Com. L. 21, 22; see as to the time, 3 L. C. 305, 306). Before obtaining an attachment, the submission must be made a rule of court, which can now be done in all cases where there is a written submission (9 & 10 W. 3, c. 15; C. L. P. Act, 1854, s. 17; 1 L. C. 158). The proceeding by way of attachment is similar to that stated under the head of "*Contempt*," *ante*, pp. 31, 32 (see Reg. v. Hemsworth, 3 C. B. 745; Higgins v. St., 3 L. C. 52). The remedy by execution is given by the 1 & 2 V. c. 110, s. 18, but is confined to awards for the payment of money only, and to cases in which an attachment would have been granted (1 L. C. 61, 62). If there be any doubt as to the validity of the award, or as to the party's liability,

proceedings under the statute cannot be had (Hawkins v. Be., 2 D. & L. 465; Holcroft v. Ma., 2 D. & L. 319). Nor, indeed, will an attachment be granted in such cases (Cook v. Ge., 3 D. & L. 271; see Spooner v. Pa., 11 Jur. 242; 1 L. C. 61, 62). And even when an award directs a sum of money to be paid, and the submission is made a rule of court, execution for the sum awarded cannot issue without a previous rule calling upon the party to show cause why he should not pay the money awarded, and making such rule absolute (Jones v. Wi., 11 Ad. & El. 175). The rule calling on a party to pay money due on an award is a six day rule, and the court will not, in the absence of any special reason, make it returnable at a shorter date to save the term; nor will they make it returnable at chambers, but, unlike the case of an attachment, it may be moved on the last day of the term (Leble v. Ca., 24 L. J. Q. B. 96; 1 L. C. 418; Arthur v. Ma., 13 M. & W. 465). The court will not make the rule absolute without personal service, unless where it appears impossible to effect it (Winwood v. Ho., 15 L. J. Ex. 10; Hawkins v. Be., 8 Jur. 1122). In fact, as a general rule, the same formalities as in the case of an attachment are requisite (see Drew v. Wo., 24 L. J. Q. B. 22; Davies v. Pr., 25 L. J. C. P. 71). Execution cannot issue upon an award made under a *compulsory* reference pursuant to the C. L. P. Act, 1854, s. 3, without first signing judgment (Kendil v. Me., 2 Jur. N. S. 523; 25 L. J. C. P. 251). An award not set aside by the court of which



it is made a rule (see C. L. P. Act, 1854, s. 17; 1 L. C. 151) for invalidity, is in general conclusive and final (Rose. Ev. 180, 9th ed.); and upon an action or other proceeding to enforce it, no objection to its validity can be made, except a defect apparent on the face of the award: all extrinsic objections must be taken in the shape of an application to set aside the award (*Tillam v. Copp*, 5 C. B. 211; 3 St. C. 358, 4th ed.). An application to set aside an award on an ordinary reference must be made before the last day of the term next after the award is made and published; in the case of a *compulsory* reference, the application must be made within the first seven days of the term next after the award (2 L. C. 377; *Riccard v. Ki.*, 15 L. J. Q. B. 269; C. L. P. Act, 1854, s. 9). The objections must be specified in the rule *nisi* (R. G. H. T. 1853, pl. 169; see 3 L. C. 282, 412). An award under a compulsory reference may be enforced after seven days from its publication, though the time for moving to set it aside have not elapsed (C. L. P. Act, 1854, s. 10). So the costs may be taxed on any award before such time has elapsed (R. G. H. T. 1853, pl. 170; see as to the time generally, 3 L. C. 305, 306). An award does not pass the property in *goods* (*Hunter v. Ri.*, 15 Ea., 100), but by the C. L. P. Act, 1854, s. 16, an award directing the possession of *land* to be delivered may be enforced summarily like a judgment in ejectment (3 Steph. C. 356, n., 4th ed.; 1 L. C. 158). As to remitting back the award to the arbitrators, see C. L. P. Act, 1854, s. 8; 3 L. C. 52; 4 L. C. 379. As

to arbitrations stating a special case, see C. L. P. Act, 1854, s. 5; 1 L. C. 157; 2 L. C. 270. As to the administration of an oath to witnesses, see 4 L. C. 246.

## B.

**BACKING A WARRANT.** The warrant of a justice of the peace cannot be enforced or executed in any other county than that in which he has jurisdiction, unless a justice of such other county wherein it is to be executed *indorses* or writes on the back of such warrant an authority for that purpose, which is thence termed backing the warrant. By the 11 & 12 V. c. 42, and 14 & 15 V. c. 55, a warrant issued in England or Wales may be backed not only in another English county or place, but in Scotland, Ireland, or the Channel Islands, or *vice versa* (F. Bk. 337). By 11 & 12 V. c. 43, s. 3, the provisions of the 11 & 12 V. c. 42, are extended to warrants in the cases of summary convictions. As to the apprehension of offenders within the United Kingdom for offences out of the United Kingdom, and *vice versa*, and in the cases of international offenders, see *ante*, p. 21.

**BAIL (CIVIL CASES).** The setting at liberty of a person who is arrested in any action, civil or criminal, on his finding sureties for his re-appearance. It is, however, usually understood for the sureties themselves; as if A. is arrested and puts in bail, this means that he has found persons who have become sureties for his re-appearance, and who take upon themselves the re-

sponsibility of his returning or not returning when required. There are several kinds of bail in civil cases, of which the principal are as follow — viz., 1. Bail below or bail to the sheriff; 2. Bail above, special bail, or bail to the action; 3. Bail in error. Bail below or to the *sheriff* is such as a defendant puts in when arrested upon a writ of *capias*. This he does by entering into a bond to the sheriff with sufficient sureties conditioned for compliance with what is required by the writ, and which bond the sheriff is compelled by statute to accept, and to discharge the defendant out of custody. In lieu of this, the defendant may deposit with the sheriff the amount for which bail is ordered, and £10 over, to answer costs (Com. L. Pract. 91). Bail above, special bail, or bail to the action, are persons whom the defendant procures to become his sureties for the ultimate payment of the debt and costs in the action, in the event of judgment passing against him, or as an alternative that he shall surrender himself to prison. They are termed bail to the action, because they are responsible for the defendant abiding by the event of the action, and obeying the judgment of the court therein, in contradistinction to bail to the sheriff, who only undertake that the defendant shall appear according to the exigency of the writ, and provide bail to the action. The undertaking of the sureties or bail above is drawn upon a piece of parchment by the defendant's attorney, and is technically termed the bail piece. In lieu of putting in bail above, the defendant may deposit the amount for which bail ordered, and £20 over

(Com. L. Pract. 96, 97). *Bail in error* are sureties which a party prosecuting proceedings in error, commonly called the plaintiff in error, is required to find, and who undertake that the plaintiff in error shall prosecute the error with effect, and that in case the plaintiff discontinue, or the judgment in the court below be affirmed, he shall pay all the debt, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded by reason of the delay of execution on such former judgment (C. L. P. Act, 1852, s. 151; Com. L. Pract. 227). There are several ways in which the bail, after having entered into the recognisance, may be *exonerated*; in the first place, they can at any moment exonerate themselves by rendering their principal to prison; or if there is a variance between the declaration and the cause of action stated in the affidavit upon which the defendant had been originally held to bail; or if any arrangement is come to without their consent between the plaintiff and their principal, which puts them in a different position, as where further time is given to the defendant to pay; or if their principal dies, or become privileged, or it becomes otherwise impossible, by act of law, to render him, they will be exonerated; and, lastly, they may at any time before they have justified, strike their names out of the bail piece. If the defendant has put in bail to the action, and has been condemned therein, the bail, if not exonerated, must see that he pay the amount, or they must pay it themselves, or render their principal to prison; if they do none of these, their recognisance is forfeited, and they are liable to an

action thereon at the suit of the plaintiff. Before, however, the plaintiff can commence proceedings upon the recognisance, he must fix the bail—that is to say, he must issue a *ca. sa.* (which may be tested and returnable in vacation, C. L. P. Act, 1854, s. 90) to the sheriff against the defendant in the original action, returnable on a day certain, not less than eight days from its teste; this writ must also be entered in the book kept in the sheriff's office for the purpose (R. G. H. T., 1853, pl. 75). The sheriff returns the writ in this case *non est inventus* as a matter of course, and upon its return, the bail are fixed. The plaintiff may then proceed against the bail, either by an action of debt on the recognisance, or by *scire facias*. If, however, the bail render their principal within eight days of the service of the process upon them, and give notice thereof, the proceedings against them are stayed upon their paying the costs of the writ and service (R. G. H. T., 1853, pl. 108; see further, Lush's Pract. 569—572, 2nd ed.; 3 St. C. 665, 4th ed.; F. Bk. 265, 266).

**BAIL (CRIMINAL CASES).** Justices of the peace have no power to admit any person to bail for treason; nor can bail, in that case, be allowed except by order of a Secretary of State, or by the Court of Queen's Bench, or a judge thereof in vacation; while, on the other hand, they are bound to admit to bail in all cases of misdemeanor, except such as, in sec. 23 of the 11 & 12 Vic. c. 42, are particularly enumerated, and which are presently mentioned; and as to all felonies (treason excepted), as well as to the misde-

meanors so enumerated, they have a discretionary power either to admit to bail, or to commit to prison. The misdemeanors referred to above, as being in sec. 23, and for which justices are not *obliged* to take bail, are as follows: assault with intent to commit felony; obtaining, or attempting to obtain, property by false pretences; receiving property stolen or obtained by false pretences; perjury, or subornation of perjury; concealing the birth of a child by secret burying or otherwise; wilful and indecent exposure of the person; riot; assault in pursuance of a conspiracy to raise wages; assault upon a police officer in the execution of his duty, or upon any person acting in his aid; neglect or breach of duty as a peace officer; and any misdemeanor, for prosecution of which the costs may be allowed out of the county rate (11 & 12 V. c. 42, s. 23; F. Bk. 389; 4 St. C. 417, 4th ed.; Oke's Mag. Syn. 679, *et seq.*, 6th ed.). The following extract from Mr. Oke's Work will furnish further information:—"1. That it is *discretionary* with the committing magistrate whether to admit to bail in all cases of felony, assaults with intents to commit felony, and in the other above specified misdemeanors, and in these cases, it is discretionary with him whether he will certify his consent to bail being taken by another justice; 2. That in other misdemeanors than those specified he must take bail, if tendered and sufficient; and if the accused is committed, he must certify his consent to bail. 3. If the accused committed, and the committing magistrate certify his consent, where such consent is optional, as in case 1, any

justice of the same county, &c., may take the recognisance of the sureties, and a visiting justice of the gaol take the recognisances of the accused there, and his sureties also, if convenient. 4. If the accused committed for any of the misdemeanors not specified (as in 2), a visiting justice of the prison, or any justices of the same county, &c., may admit him to bail. 5. The committing justice, after committal, may take bail for any offence either at the gaol, or the sureties for the accused elsewhere, and then certify, when the accused's recognisance may be taken by the visiting justice. 6. Justices are not to admit to bail for *treason*, and under no circumstances do they upon a charge of *murder*. 7. There must be at least one surety, the accused's recognisance alone not being sufficient, as in the case of a remand, but it is usual to require two sureties. 8. The amount of the recognisance is discretionary with the justice certifying, or (where not certified) with the justice taking the bail; but the recognisance of the accused himself is usually double that of one of the sureties. It may be added, that the committing justice may require that the accused shall give the prosecutor or his attorney a given notice in writing of his intention to put in bail, with the names, &c., of his proposed sureties. The Court of Queen's Bench has authority to bail, not only in cases where the charge is originally before that court, but also in cases where it is brought before justices of the peace, and bail is refused by them. Nor is there any limit whatever to the power of the Queen's Bench in this particular; for that court or any

judge thereof in vacation may bail for any crime whatsoever, be it treason, murder, or any other offence, according to the circumstances of the case. It is not usual, however, either for the Court of Queen's Bench, or for magistrates, to admit to bail in any case of felony, except under circumstances of a special and favourable kind (4 St. C. 419; Oke's Mag. Syn. 682).

**BAIL COURT.** An auxiliary court of the Court of Queen's Bench at Westminster, wherein points connected more particularly with pleading and practice are argued and determined (1 W. 4, c. 70, s. 1).

**BAILIFF.** There are various sorts of bailiffs; as bailiffs of liberties, who have the exclusive execution of writs within their liberties, except where, as is now usually the case, the writs contain a *non omittas* clause (2 St. C. 637, 4th ed.); sheriff's bailiffs; bailiffs of the county courts; bailiffs of inferior courts generally (2 St. C. 628, note); bailiffs of lords of manors, &c. &c. Sheriffs are also called the sovereign's bailiffs, and the counties wherein it is their duty to preserve the rights of the king are frequently called their bailiwicks; a word introduced by the Norman princes in imitation of the French, whose territory is divided into bailiwicks, as that of England into counties (2 St. C. 637). The word bailiff, however, usually signifies sheriffs' officers, who are either bailiffs of hundreds or bound (or vulgarly, *bum*) bailiffs. Bailiffs of hundreds are officers appointed over those respective districts, by the sheriffs, to collect fines therein, to summon juries, to attend the

judges and justices at the assizes and quarter sessions, and also to execute writs and process in the several hundreds. Bound bailiffs are persons employed by the sheriffs for the express purpose of making arrests under writs of *capias*, and executing writs of *fi. fa.*, *ca. sa.*, and other executions, &c. (1 Bl. C. 344). The sheriff is liable for all acts done and neglects of duty by such bailiffs in the execution of process (Wood v. Fi., 16 Jur. 936; Gregory v. Co., 25 L. J. Q. B. 32). For extortion in the execution of process application may be made to the courts of common law (Com. L. Pract. 8, 9; 1 V. c. 55). The sheriff, on application, will appoint a *special* bailiff, and then such sheriff is not liable to the party (Harding v. Ho., 2 M. & G. 514; F. Bk. 87; Rosc. Ev. 780, 781, 9th ed.).

**BAILIWICK.** A county of which the sheriff is the bailiff; it also formerly signified that liberty or exclusive jurisdiction exempted from the sheriff over which the lord of the liberty appointed a bailiff. Writs of execution now run thus: "We command you that you omit, not by reason of any liberty of your county, but that you enter the same, and [take, &c.] in your bailiwick."

**BAILMENT.** Blackstone treats this as a case of trust at common law to goods. It is, however, usually defined as a delivery of goods to a person (called the bailee) for some purpose, upon a contract, express or implied, that, after the purpose has been fulfilled, they shall be redelivered to the bailor (*i. e.*, the party by whom they were delivered), or otherwise dealt with according to his

directions, or (as the case may be) kept till he reclaims them (2 St. C. 78, 4th ed.; F. Bk. 197, 208, 209). Bailments have been classified according to their several natures, and many nice distinctions have been established in respect thereof. As to the liabilities of bailees, it is established—1. That upon bailment for the mutual benefit of bailor and bailee, the latter is liable for negligence—*viz.*, for the omission of that degree of care which a man of common prudence takes of his own concerns; 2. That upon a bailment from which the bailee derives no benefit, nothing short of *gross* negligence will make him responsible; 3. That upon a bailment for his own exclusive benefit, the bailee will be chargeable even for slight negligence; 4. That he is liable in none of these cases for a robbery or other casualty in no degree attributable to his own fault. These rules, however, are subject to exception in the cases of innkeepers and common carriers (1 L. C. 93; 3 Id. 387); and they are in every case liable to be controlled by the express contract of the parties (2 St. C. 79, 80, 4th ed.; F. Bk. 197, 208, 209; 3 L. C. 387, 400; 5 L. C. 85, 86). Bailees who have bestowed labour on a chattel, so as to improve the value of it, are entitled to detain it until paid for such labour, which is called a particular lien; warehousemen, and, it seems, also carriers, have a general lien on the goods entrusted to them—*i. e.*, they may detain the goods for the amount of the general balance due to them (F. Bk. 9; Barnett v. Br., 6 M. & Gr. 630; 2 St. C. 81, 4th ed.). By the 20 & 21 V. c. 54, s. 4, bailees fraudulently converting pro-

perty bailed to them, even without breaking bulk or otherwise determining the bailment, are guilty of larceny (4 L. C. 155; F. Bk. 323).

**BANC OR BANCO, SITTINGS IN.** The sittings which the respective superior courts of common law hold during every term, and on certain appointed days after term (17 & 18 V. c. 125, s. 95), for the purpose of hearing and determining the various matters of law argued before them, are so called, in contradistinction to the sittings at *nisi prius*, which are held for the purpose of trying issues of *fact*. The former are usually held before *four* of the judges; at the latter one judge only presides, unless the trial be specially appointed for what is termed "at the bar" (Com. L. Prac. 191).

**BANISHMENT.** A punishment inflicted on an offender by compelling him to quit the realm. There are two kinds of it, one voluntary and upon oath, termed abjuration (*ante*, pp. 2, 3), which, it may be added, was abolished by 21 Jas. 1, c. 28; 1 St. C. 143, 4th ed.; the other, by compulsion for some offence or crime (1 St. C. 149; 4 Id. 514, 4th ed.). In truth, there is now no such thing as banishment, the punishment being penal servitude, in substitution for transportation.

**BANK.** Signifies *bench*, and is commonly used for the bench or seat of judgment; as *bancus regis*, or in French *bank le roy*, means the King's Bench; *bancus communium placitorum*, or *bank de common pleas*, the bench of common pleas, or the common bench.

**BANKRUPT.** A person in trade or business who from misfortunes or other circumstances is unable to meet the demands of his creditors; and has signified his inability to do so, by having done some act which the law defines to be an act of bankruptcy (see p. 9). The word is said to be derived from *bancus*, a bench or counter, and *ruptus*, broken; signifying that his shop or place of business is broken or gone. As there will soon be a new act, it is thought better not to enter more fully into this subject.

**BANNERET.** A banneret is said to be a knight made in the field, with the ceremony of cutting off the point of his standard, and so making it like a *banner*. They are accounted so honourable that they are permitted to display their arms in a *banner* in the field as barons do (2 St. C. 619, 622, note, 4th ed.).

**BANNS.** In England this word is more especially used in publishing notice of any intended marriage in the church, in order that if any person has anything to say against the marriage, he may be enabled to make his objection before it is consummated. But no banns are required for marriages in a registered dissenting chapel or before a registrar (F. Bk. 107; 3 L. C. 180, 231).

**BAR.** An answer, a preclusion, a destruction, or a prevention. Thus, when a defendant in any action pleads a plea which is a sufficient answer to the plaintiff, and which at once destroys his action, it is termed a plea in *bar*, or a peremptory plea, in opposition to a dilatory plea.

Pleas in bar are of several kinds, but the most ordinary are what are called the *general issues* (3 St. C. 571, 572, 4th ed.). In the above sense, as well as in others, the term "bar" signifies to prevent or to destroy; as when it is said that jointures have been introduced as a bar to the claim of dower, it means as a prevention to that claim (F. Bk. 129). Bar also signifies the place where the barristers stand in court to plead the causes of their clients, whence the term barrister. A trial *at bar* is a trial which is had before the whole or the majority of the judges of the court in which the action is brought, and is resorted to only in cases of unusual difficulty, and it is entirely in the discretion of the court to grant or refuse such a trial, except where the Crown is a party immediately interested (*Paddock v. Fo.*, 8 Dowl. 849). It is called a trial at bar, in contradistinction to a trial *à Nisi Prius*, where one judge only presides (3 Bl. C. 352; Co. Lit. 372 a.; *Boote's Suit at Law*, 183, n. 1; *Com L. Pract.* p. 191).

**BARGAIN AND SALE.** The name of an instrument or conveyance by which freehold property was formerly, and still is occasionally, granted or transferred from one person to another. This species of conveyance was introduced by the operation of the 27 Hen. 8, c. 10, called the Statute of Uses, and is said to be a kind of real contract, whereby one man (called the bargainor), for some pecuniary consideration, bargains and sells, that is, contracts to convey the land to some other man (called the bargainee), and becomes by such bargain a trustee for or (as the law

terms it) seised to the use of such other man, and then the statute completes the purchase. But as it was foreseen that conveyances thus made would want that notoriety which the old common law conveyances were calculated to give, it was enacted by 27 H. 8, c. 16, that such bargains and sales should not pass a *freehold*, unless the same were made by indenture, and enrolled within six lunar months in one of the courts of Westminster, or with the *custos rotulorum* of the county wherein the lands, the subject of conveyance, lie. This was enacted in order to compel the parties to reduce their contract into writing, and to prevent the frauds of secret conveyances, which, it was supposed, enrolment would effectually do, by affording the public an inspection of every such conveyance (2 Bl. C. 339). What has just been stated refers to bargains and sales of *freeholds*, but there was in common use till lately a deed called a *bargain and sale for a year*, which was, in fact, the lease which formed one portion of the compound, but now little used conveyance, called a *lease and release*, and which did not require any enrolment, which was indeed the reason for adopting it as a conveyance. The bargain and sale of the freehold (when not under authorities at common law, 2 Prest. Abr. 259, 260) was a limitation of a use which was immediately executed into a legal estate by the Statute of Uses, and as that statute does not execute a use upon a use, but only the first use, any use limited on the bargain and sale of the freehold is but a use, and not a legal estate. But in the case of the lease and

release, a term of years only is raised by the bargain and sale, and the legal estate of the freehold is, by the release, transferred under the rules of the common law, so that if the release be to A. to the use of B., the latter takes the legal estate, though in the case of a bargain and sale of the freehold (not being under a mere common law authority), A. takes the legal estate, and B. has merely a use or trust (see Burt. Comp. pl. 131—135, 137—141, 151—153; 3 L. C. 166, 167; 2 L. C. 297; F. Bk. 179).

**BANKS AND BANKERS.** Banks (not including the Bank of England), are said to be either private or joint-stock banks. Private banks are banking establishments not of such a nature as to require to be registered as joint-stock banks. There have been several statutes passed with respect to the formation, registration, and business of these banks, the provisions of which are very complicated, and too extensive to be here mentioned; but the reader is referred to 4 L. C. 190—193, for a statement of the provisions of one of the recent statutes. It is to be observed that by the 7 G. 4, c. 46, any corporation erected for the purpose of banking, or any number of persons, though exceeding six, were authorised to carry on the trade of bankers in England, registering the names and places of abodes of all the members; each of the members being severally liable to an execution for the debts, if a member at the time of the accrual or subsequently, but no execution to issue after three years from ceasing to be a member; if

not incorporated, the bank to sue or be sued in the name of a public officer. By the 7 & 8 V. c. 32, s. 21, every banker shall, on the 1st of January in every year, or within fifteen days after, make a return to the Board of Inland Revenue of the name, residence, and occupation of every member of the partnership, of the name of the firm, and of the place where the business is carried on; and the board shall, on or before the 1st of March in every year, publish the same in some newspaper, circulating either in town or country. It is also declared, that, for the future, it shall be lawful for all partnerships (though exceeding six in number), carrying on the business of banking in London, or within sixty-five miles thereof, to draw, accept, or indorse bills of exchange, not being payable to bearer on demand, anything in the 3 & 4 W. 4, c. 98, to the contrary notwithstanding. By another act, 20 & 21 V. c. 49 ("The Joint Stock Banking Companies Act, 1857"), new provisions have been made with respect to banking companies. It subjects them generally, to the regulations of the Joint Stock Companies Act, 1856 and 1857. It provides also, that, notwithstanding any prior enactment to the contrary, it shall be lawful for any number of persons, not exceeding ten, to carry on the business of banking in partnership, in all respects as any company, if consisting of not more than six, could previously have done; that any seven or more persons, associated for the purpose of banking, may register themselves as a company under that act; subject, however, to a condition that the shares



into which the capital is divided shall not be of less amount than £100 each: and that unless so registered, not more than ten persons shall, after the passing of that act, form themselves into a partnership for banking, or carrying on the business of banking (4 L. C. 190—193). By the 21 & 22 V. c. 91, joint-stock banking companies may be formed on the principle of *limited* liability, except so far as regards the issue of bank notes, as to which such joint-stock banking companies continue subject to unlimited liability (5 L. C. 178). By the 20 & 21 V. c. 54, bankers, &c., being intrusted for safe custody with property of another person, and, with intent to defraud, converting it to their own use, are guilty of a misdemeanor, and may be sentenced to penal servitude (secs. 2, 3, 10; 4 L. C. 154, 155; F. Bk. 323).

**BARON.** A title of nobility one degree below a viscount (1 Bl. C. 398; F. Bk. 80; 2 St. C. 611, 621, n., 4th ed.).

**BARONET.** An hereditary dignity created by letters patent, and descendible to the male heirs of the grantee (1 Bl. C. 403; F. Bk. 82; 2 St. C. 619, 4th ed.).

**BARONS OF THE EXCHEQUER.** The judges of the Court of Exchequer are so called, the same as the judges of the Courts of Queen's Bench and Common Pleas are called *justices* (3 St. C. 391, 4th ed.).

**BARONY.** That honour and territory which give title to a baron, comprehending his lands, fees, and other baronial rights and dues (1 St. C. 216, 4th ed.).

**BARRATOR.** One who frequently excites or promotes suits and quarrels between her Majesty's subjects, either at law or otherwise (4 Bl. C. 134). A common person is punishable with fine and imprisonment. An attorney may be summarily ordered to be kept in penal servitude for not more than seven years (12 G. 1, c. 29; 4 St. C. 302, 4th ed.).

**BARRATRY.** Any act of the master or of the mariners of a ship which is of a criminal or a fraudulent or wilful nature, tending to the prejudice of the owners of the ship without their consent or privity; as by running away with the ship, sinking her, deserting her or embezzling the cargo (1 Park on Ins. 137, 138; 4 Bl. C. 134; Jones v. Ni., 10 Ex. 18; Rosc. Ev. 300, 9th ed.; 5 Bac. Abr. 462—466, 7th ed.; as to the criminal offence, see 4 St. C. 210, 258, 4th ed; 7 W. 4, and 1 V. c. 89, ss. 6 and 18).

**BARRISTER-AT-LAW.** A counsellor learned in the law who pleads at the bar of the courts, and takes upon himself the advocacy or the defence of causes given him by those who retain or employ him. He must be first called by one of the inns of court after keeping three years' terms, and attending the lectures of the inns, and it is proposed that for the future an examination shall be indispensable. A barrister cannot sue for his fees as such: they are a mere honorarium (re May, 7 W. R. 126: 6 L. C. 00). He cannot bind the lay-client by a compromise, but he may as to the mere amount of damages (4 L. C. 79; 6 L. C. 32).

**BASE FEE.** A base or qualified fee, taking the term in its extended and original sense, is an estate which has some qualification subjoined thereto, and which must cease or be determined whenever such qualification is at an end. As in the case of a grant to A. and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So when Henry the Sixth granted to John Talbot, lord of the manor of Kingston-Lisle, in Berks, that he and his heirs, *lords of the said manor*, should be peers of the realm, by the title of barons of Lisle; here John Talbot had a *base or qualified fee* in that dignity, and the instant he or his heirs quitted the seigniority of this manor, the dignity was at end. These estates are fees simple because it is *possible* that they may endure for ever in a man and his heirs; yet as that duration depends on certain collateral circumstances, which qualify and debase the purity of the donation, it is therefore not an absolute, but is called a base or qualified fee (2 Bl. C. 109, 110; 1 St. C. 240, 4th ed.; F. Bk. 122). However, the term "base fee" has usually a more restricted application—viz., to that species of qualified fee which is created where tenant in tail conveys his estate by bargain and sale to another and his heirs, and which Lord Coke describes as a determinable fee derived out of an estate tail. And in the act for Abolition of Fines and Recoveries (3 & 4 W. 4, c. 74), its meaning is by express provision confined (so far as that act is concerned) to the estate created by the alienation of the

tenant in tail where the issue are barred, but those in remainder or reversion are not (2 L. C. 404; F. Bk. 122, 153).

**BASTARD.** A person not born in lawful wedlock, or, in the case of a marriage, born under such circumstances that no access to the wife could be presumed (see F. Bk. 113, 114; 1 Q. B. 444; 9 Beav. 444). The English law does not require that the child should be begotten after lawful wedlock, but it is an indispensable condition to make it legitimate that it should be *born* after that period. A bastard follows the settlement of his mother, until the age of sixteen, unless in the meantime he acquires another (1 L. C. 18, 336; F. Bk. 92, 93). A bastard cannot be heir to anyone, not even where, being born out of England, he is entitled to inherit by the laws of his country and his status of legitimacy would in other respects be here recognised (Burt. Comp. pl. 309; Doe v. Va., 5 B. & Cr. 438; 4 Jur. 1076; 9 Bli. N. S. 32; 3 L. C. 243; 4 L. C. 113; re Don, 5 W. R. 836); nor can he have any heir except his own descendants; he may gain a name by reputation and take by gift (19 L. T. 152; 1 L. C. 104; 4 L. C. 361, 362). The reputed father cannot appoint a guardian for the child, nor can he or even the mother give a consent to his marriage (F. Bk. 115). A bastard may be legitimated by act of Parliament (1 Yo. & C. N. C. 4). An order of affiliation on the putative father may be obtained, within a limited period, the evidence of the mother being corroborated in some material particular, under which a

weekly sum may be ordered to be paid, with incidental expenses. The putative father may appeal (1 L. C. 382; 2 L. C. 411, 412; F. Bk. 114; Potts v. Ca., 4 L. C. 346, 347).

**BENCHER.** A privileged person or officer of the inns of court is so termed. Each inn of court is presided over by a certain number of benchers, who exercise the right of admitting candidates as members of their society, and also of ultimately calling them to the bar. They are usually selected from those of their members who have distinguished themselves in their profession: and it is the ordinary practice for each inn of court to elect its member a bencher as soon as he has attained the rank or degree of Queen's counsel, but in some cases others are selected (1 St. C. 20, 4th ed.).

**BENCH WARRANT.** The process issued against a party against whom an indictment for misdemeanor has been found, for the purpose of bringing him into court to answer the charge preferred against him. When an indictment has been found for a misdemeanor during the assizes or sessions, it is the practice for the judge attending the assize, or for two of the justices attending the sessions, to issue a bench warrant signed by him or them, to apprehend the defendant. But now a warrant may be issued by any justice of the peace, for by the 11 & 12 V. c. 42, s. 3, where the defendant has not appeared and pleaded, the clerk of indictments or of the peace is, after the end of the sessions at which the indictment was found, to

grant a certificate of the indictment having been found; upon this certificate being produced to any justice for the county, &c., in which the offence was committed, or in which the defendant "shall reside or be, or be supposed or suspected to reside or be," he must issue his warrant for the defendant's apprehension (4 St. C. 447, 4th ed.; F. Bk. 342).

**BENEFICE.** In a general sense this term is taken for any ecclesiastical living, or church preferment, whether a dignity or other; and it must be given for life, not for years or at will (1 Bl. C. 107). But popularly the term is confined to rectories, vicarages, and perpetual curacies. And see 1 & 2 V. c. 106, s. 124, where the two terms benefices and cathedral preferments are used as distinct.

**BENEFICIAL INTEREST.** A person is said to have a *beneficial interest* in anything, when he has or is entitled to the real benefit, advantage, or property in such thing. Thus, if B.'s estate is held by A., under such circumstances as to create a trust for B., the latter is the party who has the beneficial interest in the estate, although the *legal* title to the estate is vested in A. If the trust be simply for B., he may require A. to convey the legal estate to himself.

**BENEFIT BUILDING SOCIETIES.** These are societies — some perpetual, others terminable — established under statutory provisions to raise a subscription fund, by advances from which the members shall be enabled to build or purchase dwelling-houses, or to purchase lands, such advances

being secured to the society, by mortgage of the premises so built or purchased. By the 6 & 7 W. 4, c. 32, societies of this description, upon the certificate of their rules, as required by the acts relative to friendly societies, are enabled to transfer shares without payment of Stamp Duty, and to effect reconveyances of the mortgaged property by a mere receipt for the money advanced, without incurring the expense of a formal instrument. They are also made subject, in general, to the various provisions of the law relating to friendly societies. As to forfeiture of shares by non-payment of subscriptions, see *Card v. Ca.*, 26 L. J. C. P. 113; 4 L. C. 25. As to the terms of redemption, see *Fleming v. Se.*, 3 D. M. & G. 997; *Archer v. Ha.*, 29 L. T. 71; 3 L. C. 395; *Smith v. Pi.*, 30 L. T. 196; 4 L. C. 260. That the societies are within the winding up acts, see *St. Geo. Ben. Soc.*, 27 L. J. Ch. 96; 4 L. C. 299.

**BEYOND THE SEAS.** No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark (usually called the Channel Islands), nor any islands adjacent to any of them (being part of the dominions of her Majesty) are deemed beyond the seas within the meaning of the Statute of Limitations, 3 & 4 W. 4, c. 27. It appears, however, to have been held that Dublin, or any place in Ireland, was beyond the sea within the meaning of the Statute of Limitations, 21 Jac. 1, c. 16 (*Shelf. Rl. Prop. St.*, 181, 4th ed.). By the 19 & 20 V. c. 97, s. 12, the Channel Islands are not to be deemed to be beyond the seas

within the 4 & 5 Anne, c. 16, and by sec. 6, bills and notes drawn and made payable in any of those islands are to be deemed "inland" bills or notes (3 L. C. 90, 91). As to repairs of ships, see sec. 8 of the 19 & 20 V. c. 97. Being beyond seas operated to prevent the Statutes of Limitations, in most instances, from running against a claim or right, but by the 19 & 20 V. c. 97, s. 10, absence beyond seas of a creditor is not to entitle him to additional time for the purpose of suing, beyond the periods fixed by the 21 Jac. 1, c. 16, s. 3: 4 Anne, c. 16, s. 17; 53 G. 3, c. 127, s. 5; 3 & 4 W. 4, c. 27, ss. 40—42; 3 & 4 W. 4, c. 42, s. 3. Nor by sec. 11 is the fact of *one or more* of several joint debtors, being beyond seas, to entitle the creditor to additional time as against the others (3 L. C. 89, 91; F. Bk. 269).

**BIGAMY** properly signifies being twice married; but as it is generally understood now it signifies the crime of polygamy, or having a plurality of wives or husbands at once. The 20 & 21 V. c. 85, gives a definition for the purposes of that act (the Divorce and Matrimonial Causes Act, 4 Bl. C. 163; F. Bk. 310, 311). The punishment is penal servitude for not more than seven years or imprisonment, with or without hard labour for not more than two years. The offence does not arise—1. where the second marriage is not by a subject, *and* is performed out of England; 2. where the husband or wife shall absent him or herself the one from the other by the space of seven years together, the one of them not knowing the other to be living within that time (*R. v. Cullen*,

9 C. & P. 681); 3. where the party shall, at the time of the second marriage, have been divorced *à vinculo*; 4. where, at the time of such marriage, the former marriage shall have been declared void by the competent court (2 Smith's L. C. 593, 4th ed; 3 L. C. 229, 267, 366; 4 St. C. 346, 4th ed.).

**BILL.** In criminal matters, when a grand jury upon any presentment or indictment, consider the same to be probably true, they write on it the words, "true bill," and thereupon the accused party is said to stand indicted of the crime, and is bound to make answer to it before the ordinary or petty jury, by whom, should he be found guilty, he stands convicted of the crime, and is by the judge condemned accordingly.

**BILL IN CHANCERY.** The most common method of instituting a suit in the Court of Chancery is by addressing a *bill* to the Lord Chancellor in the nature of a petition. This bill is a statement of all the circumstances which gave rise to the complaint, winding up with a prayer for relief, according as the nature of the case requires. When this bill is prepared, it is printed and left with the proper officer of the court in order to be filed; and this is what is termed filing a bill in equity (Gray's Chan. Prac. p. 3; 3 Bl. C. 442; F. Bk. 283; 3 L. C. 390). Where an injunction or writ of *ne exeat regno* is prayed, or a party is to be made a ward of court, a written copy of the bill may be filed, to be afterwards followed by a printed copy (1 L. C. 239; 4 L. C. 174; 15 & 16 V. c. 86, ss. 1—6). The interrogatories

formerly formed part of the bill, but they are now distinct (see 15 & 16 V. c. 86, ss. 10—13; 3 L. C. 390; F. Bk. 284, 285; 5 L. C. 199, 200). Formerly a *subpœna* was issued to compel appearance to the bill, but now a copy of the bill is served in lieu thereof (15 & 16 V. c. 86, ss. 2, 3; F. Bk. 284).

**BILL OF EXCEPTIONS.** If during a trial the judge in his directions to the jury, or in his decision, mistakes the law, either through ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a bill of exceptions, which is a statement in writing of the point wherein he has committed the error, and which statement, by affixing his seal, he thus acknowledges (Smith's Action at Law, p. 82; 3 Bl. C. 372). This statement should properly be put in writing while the court is sitting, and in the presence of the judge who tried the cause, and signed by the counsel on each side; after which it is formally drawn up, and tendered to the judge to be sealed. A bill of exceptions is said to be in the nature of an appeal from the judgment or decision of the court below to a court of error (see Will. Plead. 165, 216; Com. L. Pract. 190, 191). A bill of exceptions will not lie by a plaintiff who has submitted to be nonsuit (Ibid.). In the cases of petitions for dissolution of marriages, on any trial or issue, a bill of exceptions may be tendered (F. Bk. 364).

**BILL OF EXCHANGE.** A bill of exchange is defined by Blackstone to be an "open letter of request from one man to another, desiring him

to pay a sum named therein to a third person on his account;" more precisely it is a written order or request for payment "a sum of money to the person mentioned therein, or to order, &c. (2 St. C. 112, 4th ed.; 5 L. C. 12). The person who draws or makes the bill is called the *drawer*; the person to whom it is addressed is called the *drawee*; and when the drawee has undertaken to pay the amount (which undertaking he signifies by writing across the bill of exchange the word "accepted," together with his name and sometimes the place where the money is to be paid), then he is called the *acceptor*; the person to whom the money is ordered to be paid is called the *payee*; and if the latter transfers it over to another (which he may do in two ways—1. by simply writing his name across the back, and then the bearer of the bill is entitled to payment on presentment: this is called an indorsement in blank; or 2. by writing "pay the contents to Thomas Lean or order," which is called a special indorsement), he is then called the *indorser*, and the person to whom he thus transfers it is called the *indorsee*, which latter person may also, if he pleases, in his turn transfer it to another party (by the same process of signing his name on the back, or indorsing it as it is termed), and thus it may be transferred from one person to another *ad infinitum*, the party transferring it always being called the *indorser*, and the party to whom transferred, the *indorsee*: by which means a man is sometimes both an indorsee and an indorser, according as his relation to the person who indorsed to him, or to whom he

indorsed is considered. To illustrate the subject further, a common form of a bill of exchange is here given:—

£1000.

London, Jany. 1, 1859.

*Two months after date please to pay to John Thompson or order the sum of two hundred pounds, and place the same to my account.*

JOHN JONES.

*To Mr. James Harrison.*

Now, in the above form, John Jones is the drawer of the bill, James Harrison is the drawee (and when he has signified his acceptance of the bill by writing across the face of it in manner before mentioned "*Accepted, James Harrison*," he is then also termed the acceptor), and John Thompson is the payee. It has been above assumed that the payee is a different person from the drawer; but this is not absolutely necessary, for a bill may be drawn payable to the drawer or his own order, inserting in the above form instead of the words "*John Thompson*," these words, "*me or my order*:" in this case, the drawer is also the payee. It has also been assumed that the bill is made payable to order, but it may be made payable to a person *simpliciter*, or to him or *bearer*, in which case the payee may transfer the bill to any stranger by merely delivering it into the hands of such stranger, thus dispensing altogether with the written indorsement required where the bill being payable to a person or his order is indorsed by him (Com. L. Princ. 86). It may be remarked that if a bill, though pay-

able to order, be once indorsed in *blank*, it will, though afterwards *specially* indorsed, as against the drawer, the payee, the acceptor, the blank indorser and all indorsers before him, be payable to *bearer*; though as against the special indorser title must be made through his indorsee (Com. L. Princ. 113). A bill or note not payable to the payee's *order* or to *bearer*, is not transferable so as to charge the drawer or acceptor, though such payee transferring the bill, will be liable to his transferee (Selw. N. P. 340, 362, 11th ed.; Com. L. Princ. 112).

**BILL OF LADING.** A bill of lading is a memorandum signed by the captain or master of a ship, acknowledging the receipt of goods on board, and undertaking to deliver them in good order and condition at the port for which they are destined. One of these bills is usually kept by the captain, one by the person who ships the goods, and one is sent to the party abroad to whom the goods are going, who, on the arrival of the vessel at port, is enabled to claim his goods on presenting to the captain his bill of lading (3 L. C. 20; 2 L. C. 122).

**BILL OF SALE.** This is an instrument under seal, by which a man transfers the right or interest which he has in goods and chattels. It is a mode of passing personal chattels, as an assignment is of leaseholds, and a grant of freeholds. Some recent enactments and decisions, have rendered this title one of some importance. It may be observed, that an absolute and unconditional bill of sale, although

made *bonâ fide* and for a valuable consideration, is void as to creditors, when the possession is retained by the donor (Twyne's case, 3 Rep. 80); but where a bill of sale is given as a security for an antecedent debt or a present advance, and the possession is retained by the donor, and the deed of security provides that, until default shall be made in payment of the moneys, possession of the goods shall be retained by the mortgagor, then so long as the possession of the goods is consistent with the terms of the deed, and no bankruptcy or insolvency intervenes, there is no ground for impeaching the transaction (Martindale v. Bo., 3 B. & Ad. 498). So where goods and chattels are settled in such manner that the settlor may enjoy the use of them during his or her life, there the retention of the possession of the goods being in accordance with the terms of the deed, there is no ground for calling the settlement in question (Haselinton v. Gi., 3 T. R. 620, n; 1 B. & C. 666). And it is not to be inferred from what has been said, that a bill of sale will be rendered invalid in all cases where possession is retained by the donor, unless the security contains a proviso enabling him to hold possession until default. In the case of Cook v. Walker (3 W. R. 357; 1 L. C. 407), a bill of sale was given by way of security but no such proviso was inserted, and it was held, that as there was no evidence that the party was in insolvent circumstances at the date of the bill of sale, it was valid as against creditors notwithstanding he retained the possession of the furniture, &c. The reason given by the Vice-Chancellor for arriving at this conclusion was, that the transaction was

a mortgage, and that it appeared necessary for the purpose of his business that the party executing the bill of sale should remain in the possession of the property. Indeed, it is fully settled that a sale of goods is not vitiated on the ground that it was made with a view to defeat an intended execution on the goods of the vendor, the subject of the sale, supposing it to be in all other respects *bonâ fide* (Wood v. Di., 7 Q. B. 892; Rosc. Ev. 786, 9th ed.; Hale v. Me. S. O. Co., 7 W. R. 316). However, it seems that a bill of sale is void under the 13 Eliz. c. 5, as to subsequent creditors, if they are thereby delayed or defrauded (Graham v. Fu., 23 L. J. C. P. 51; Rosc. Ev. 701, 786, 9th ed.). A bill of sale of goods by a trader, who while retaining possession becomes bankrupt, is not valid against the assignees; the goods (not being fixtures, see 26 L. J. Ex. 129; but see 3 L. C. 87) are in the reputed ownership of the bankrupt, and therefore pass under sec. 125 of the 12 & 13 V. c. 106, to his assignees; this is so whether the bill of sale be absolute or conditional (2 L. C. 333; 1 L. C. 280; Freshney v. We., 26 L. J. Ex. 129; 31 L. T. 270; Rosc. Ev. 710, 711, 9th ed.). If the party entitled under the bill of sale take possession before the bankruptcy (though after the act of bankruptcy), not having notice of it, he is entitled to hold the goods, this being a protected transaction under sec. 133 of the Bankruptcy Act (Graham v. Fu., 23 L. J. C. P. 10). A bill of sale may be avoided as an act of bankruptcy (see 4 L. C. 57); but this doctrine does not extend to a bill of sale given to secure an advance made at the time of its being executed

(Hutton v. Cr., 22 L. J. Q. B. 78; 1 L. C. 195; Graham v. Ch., 21 L. J. C. P. 173; Harris v. Ri., 32 L. T. 389; F. Bk. 216; 3 L. C. 33; 4 Id. 57). Under the Protection and Insolvency Acts, no person can avail himself of a bill of sale after the insolvency of the assignor (1 V. c. 110, s. 61; 7 & 8 V. c. 96, ss. 17. 21; Simpson v. Wo., 21 L. J. Ex. 152; Congreve v. Ev., 23 L. J. Ex. 273; 18 Jur. 655; Hardey v. Ti., 19 L. J. Ex. 233; see 1 L. C. 280; as to bills of sale extending to after-acquired goods, see F. Bk. 206; 2 L. C. 185, 188, 333; Beaum. Bills of Sale, 26; 6 W. R. 578). The most important point remaining to be mentioned, is that by the 17 & 18 V. c. 36, bills of sale are required to be filed within twenty-one days after the making thereof; by section 1, every bill of sale of personal chattels made after the passing of this act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale, or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed, or therein referred to, or a true copy thereof and of every attestation of the execution thereof, shall together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same (see Allen v. Th., 3 L. C. 45; Hatton v. In., 28 L. T. 231; 3 L. C. 259), or in case the same shall be made or given by any



person under or in execution of any process, there a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale (as to which see *re O'Connor*, 27 L. T. 27; 2 L. C. 379; *Allen v. Th.*, 3 L. C. 45; *Tuton v. Sa.*, 6 W. R. 545; 5 W. R. 23, 24,) be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench, within twenty-one days' after the making or giving of such bill of sale (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed), otherwise such bill of sale shall, as against all assignees (see 4 L. C. 29; 29 L. T. 185) of the estate and effects of the person whose goods or any of them are comprised in such bill of sale under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any court of law or equity authorising the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in, or right to, the possession of any personal chattels comprised in such bill of sale, which, at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the

benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be." By the second section, every defeasance or condition, or declaration of trust, not contained in the body of the bill of sale, for the purposes of the act, is to be taken as part thereof, and must be written on the same paper or parchment. The third section provides that the officer of the court shall keep a book containing the particulars of each bill of sale, and that every bill of sale, or a copy thereof so filed, may be searched for on the payment of sixpence for every search against one person. By the seventh section it is declared that in construing the act the expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels (including post-nuptial settlements, 32 L. T. 293), and also powers of attorney, authorities or licenses to take possession of personal chattels as security for any debt, but not assignments for the benefit of creditors (4 L. C. 264); the expression "personal chattels" shall mean goods, furniture, fixtures (see *Waterfall v. Pe.*, 27 L. T. 252; 3 L. C. 87), and other articles capable of complete transfer by delivery; and personal chattels shall be deemed to be in the "apparent possession" of the person making or giving the

bill of sale, so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person. The act has no application where the whole freehold or leasehold estate is conveyed (*Mather v. Fr.*, 2 L. C. 384; 3 L. C. 87; *Waterfall v. Pe.*, 27 L. T. 252; 4 L. C. 96). It must not be supposed that this act attempts to repeal or in any respect to affect the provisions of the bankrupt or insolvent acts with reference to such property as may be in the order or disposition of the bankrupt or insolvent at the date of his bankruptcy or insolvency. Such an operation was never contemplated, and a bill of sale may be duly filed under the Registration Act, and yet may eventually be inoperative under the order and disposition clauses of the acts referred to (*re Daniel*, exp. *Ashby*, 25 L. T. 188; *Pridx. Conv.* 326, 2nd ed.). In the case of a mortgage of the fee, or of the whole leasehold interest of the assignor, with the fixtures, the bill of sale does not require registration: the fixtures being trade fixtures, and therefore severable, does not make any difference (*Mather v. Fr.*, 25 L. J. Ch. 361; *Waterfall v. Pe.*, 26 L. J. Q. B. 100; exp. *Scott*, 29 L. T. 314; 2 J. C. 383; 3 L. C. 87; 4 L. C. 96).

**BILL OF COSTS.** By the 6 & 7 V. c. 73 no attorney or solicitor shall commence or maintain an action or suit, for the recovery of any

fees, charges, or disbursements, for any business done by him, until the expiration of *one (calendar) month* or more after such attorney or solicitor respectively shall have delivered unto the party to be charged therewith, or sent by the post, or left for him, her, or them, at his, her, or their counting-house, office of business, dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements—which bill shall be subscribed with the proper hand of such attorney or solicitor, or in the case of partners by one of them, or be accompanied by a letter so signed, and referring to the bill (see fully, *Com. L. Pract.* 77—85; 3 St. C. 312, 4th ed.).

**BILL, PARLIAMENTARY.** Parliamentary bills are divided into two classes—viz., public and private bills; the former are such as involve the interests of the public at large, and, when passed by all the legislature, and assented to, become a portion of the public statutes of the realm; the latter are such as have reference to the interests of private individuals, and are frequently introduced to enable them to undertake works of public utility at their own risk; such, for instance, are the various bills introduced for the purpose of establishing railway companies; such also are those of naturalisation, for change of name, for divorce, &c. (see further, 4 L. C. 152—154).

**BILL OF PARTICULARS.** A bill of particulars, or, as it is frequently termed, a particular of the plaintiff's demand, is a statement in writing of what the plaintiff seeks to recover in his action. Its object is to fur-

nish the defendant with a better or more specific statement of the plaintiff's cause of action than is to be collected from the declaration. The bill of particulars "differs from the declaration, inasmuch as the one discloses the nature and legal effect of the plaintiff's claim, the other its component ingredients" (Lush's Pr. 374; *Pylie v. St.*, 6 Mee. & W. 814). No particulars are now required to be delivered with a declaration where the writ of summons has been specially indorsed; but in other cases, where the declaration contains the common counts, particulars must be delivered or filed therewith, otherwise the plaintiff will not be entitled to the costs of any particulars ordered to be delivered, or of the application for such particulars (*R. G. H. T.*, 1853, pl. 19; 1 Com. L. Prac. 115).

**BILL OF RIGHTS.** The statute 1 Will. and Mary, stat 2, c. 2, is so termed because it declares the true rights of British subjects. It had its origin in a declaration delivered by the Parliament to the Prince and Princess of Orange in 1688 (2 St. C. 479, 4th ed.).

**BILLS, PUBLIC AND PRIVATE.** A bill, in the language of the legislature, is the draft of an act of Parliament as originally submitted to either House of Parliament, and which, having gone through its various stages in both, and received the royal assent, becomes an act of Parliament. Bills are of two classes, public and private; the former are brought in by members upon a motion of leave, and the latter are introduced upon petition.

**BIRTH, CONCEALMENT.** The concealment of the birth of a child is a misdemeanor, punishable with imprisonment with or without hard labour for not more than two years: it is not necessary to prove whether the child died before, at, or after its birth (9 G. 4, c. 31, s. 14; 4 St. C. 350, 4th ed.; 1 L. C. 207).

**BIRTHS, REGISTRATION.** The parish registers are evidence of the time of the baptism, and not of the time of the birth of children, whilst the registration established by the 6 & 7 W. 4, c. 86, and 7 W. 4, and 1 V. c. 22, is evidence of the time of the birth of the children. By the 52 G. 3, c. 146 (as amended), registers of public and private baptisms (and burials) solemnized according to the rites of the established Church in any parish or chapelry in England, shall be made (within seven days after the celebration of the same) by the rector, vicar, curate, or other officiating minister of the parish, in books of parchment or durable paper; wherein such particulars shall be inscribed, and in such form and manner as by the schedule to the act annexed is set forth. In cases where the baptism or burial is performed in any place other than the parish church or churchyard (and not being in ground provided under the Burial Acts, 20 & 21 V. c. 81, s. 16), by a clergyman, not being the rector, vicar, or curate of the parish, he must transmit on that or the following day a certificate that he has performed such ceremony, to the minister of the parish, who shall duly enter it among the parish registers. The books wherein such entries are made are to be carefully

preserved by the officiating minister, in a dry, well painted, iron chest, and are not to be removed therefrom except for the purpose of making such entries or other such specific purposes as mentioned in the act. An annual copy of the contents of these register books, certified by the minister, is to be transmitted by the churchwardens by post to the registrar of the diocese, who is bound to make report to the bishop whether he has duly received such copies or not; and alphabetical lists of the entries are directed to be made out by the registrar, which are to be open to public search at reasonable times, upon payment of certain fees. So far as to the regulations relating to the Church of England: we now turn to those provisions, of modern date, for the registration of the civil part of the ceremonies. By the Registration Acts, every district registrar is authorised and required to inform himself carefully of every birth which shall happen in his district; and to learn and register, as soon after the event as may conveniently be done, such particulars as are required by the schedule annexed to the 6 & 7 W. 4, c. 86, to be registered touching such birth, and the father or mother of any child born, or the occupier of any house in England wherein any child shall be born, may, within forty-two days after the day of such birth, give notice thereof to the registrar of the district, and within the same period the father or mother of any child born in England, or, in case of their death or other inability, the occupier of the house shall, upon being requested so to do, give information to the best of his

or her knowledge and belief, of the several particulars required to be known and registered touching the birth of such child. After the expiration of the above mentioned period of forty-two days, registration may still take place; but in this case, a solemn declaration as to the truth of the particulars required must be made by the father or guardian, or some person present at the birth, and the entry of the birth must be signed not only by the registrar, but by the superintendant registrar: and a fee is payable to each of these officers by the person requiring the registry to be made. And after the expiration of six calendar months from the time of the birth, no registry thereof can upon any pretence be made, except in the case of a child born at sea (3 St. C. 329, 4th ed.). With regard to the proof of the entries made in the different registers, it is provided by the 8 & 9 V. c. 113, s. 1, that whenever, by an act of Parliament, any certificate, official or public document, or document or proceeding of any corporation or company, or any certified copy of a document, by-law, entry in register or other book, or of any other proceeding, shall be "receivable in evidence of any particular," the same shall be admitted, provided they purport to be sealed, stamped, or signed, as required or directed by the act, without any proof of the seal, stamp, or signature, or official character of the person signing, and without any further proof thereof, in every case in which the original could have been received. By the 14 & 15 V. c. 99, s. 14, when any book or document is of such a public nature as to be admissible in evidence on its mere production from

the proper custody, and no statute exists to make its contents proveable by a copy, any copy or extract shall be admissible, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted; and the officer is required to furnish such certified copy or extract, on application at a reasonable time, and payment of a sum not exceeding four pence per folio of ninety words. It has been held, that certified copies of parish registers, purporting to be signed by A. B. "incumbent," or "rector," or "vicar," or "curate," without specifying the parish over against the name, or adding "of the above parish," are admissible without verification, for it will be intended that the incumbent, &c., is incumbent of the parish named in the certificate, and is the officer entrusted with the custody of the original register (re Hall, 22 L. J. Ch. 177). By the 3 & 4 V. c. 92, and 21 & 22 V. c. 25, certain non-parochial registers of *births*, and *baptisms* (also of deaths, burials, and marriages) are made admissible in evidence (Rosc. Ev. 112, 9th ed.; 5 L. C. 99; 3 St. C. 331, 4th ed.).

**BLANK BAR.** A plea which a defendant sometimes pleads in an action of trespass *quare clausum fregit*, when he wishes to compel the plaintiff to assign or point out with greater particularity the place where the trespass was committed. Thus, if the grievance alleged in the declaration is the breaking of the plaintiff's close in a certain parish, without further particularizing the close, and the defendant should have

any freehold land in the same parish, he may be supposed to mistake the close mentioned in the declaration for his own, and may therefore consistently enough plead that the close in which the trespass was committed is his own freehold; which is called by the several appellations of the common bar, bar at large, or blank bar (Step. Pl. 250, 251). However, such pleas are now seldom used, for by R. G. T. T., 1858, pl. 18, in actions for trespass to land, the close or place in which, &c., must be designated in the declaration by name or abutments or other description, in failure whereof the plaintiff may be ordered to amend, with costs, or give such particulars as the court or judge may think reasonable

**BOARD OF CONTROL.**—This board, otherwise denominated the Board of Commissioners for the affairs of *India*, was established in 1784 for the purpose of bringing the administration of the East Indies under the more effectual superintendence of the home government. It has been abolished by the 21 & 22 Vic. c. 106, which transferred to the Sovereign the Government of India, and enabled the Secretary of State to exercise the powers theretofore exercised by the East India Company or the Board of Control (5 L. C. 180, 181).

**BONA NOTABILLA.** Formerly used of such goods as a party dying had in another diocese than that wherein he died, amounting at least to £5, which whoever had, must have had his will proved before the archbishop of that province, unless by composition or custom, other dioceses were authorised to do it,

where *bona notabilia* were rated at a greater sum. If, however, a person happened to die in another diocese than that wherein he lived, while on a journey, what he had about him of the value of £5 was not *bona notabilia*. The jurisdiction of the spiritual courts in respect of probates and administrations, has been transferred to the Court of Probate and its district registries (20 & 21 V. c. 77; 4 L. C. 166—169, 284; F. Bk. 228).

**BONA VACANTIA.** Goods in which no one can claim a property but the king; such as royal fish, shipwrecks, treasure trove, waifs, strays, the chattels of an intestate leaving no next-of-kin, &c. (1 Bl. C. 298, 299; 5 L. C. 2).

**BOND.** A bond or obligation is a deed whereby a person binds or obliges himself, his heirs, executors, and administrators, to pay a sum of money, or to do any other act within a certain time (5 L. C. 183, 196). The person who enters into a bond, and thus binds or obliges himself to do a certain act, is termed the *obligor*; the party to whom the bond is given, is termed the *obligee*; and the terms of the bond are generally such that the obligor must either perform the act specified therein, or submit to pay a penalty for non-performance of it; the amount of which penalty is always specified in the bond. There is usually, also, added what is termed a condition, which is simply a statement of the conditions which the obligor subjects himself to in the bond to which it is annexed. A bond is *sealed* the same as any other deed of importance, and hence it is called a *specialty*, meaning

an instrument of *special* or peculiar importance. The requisites to make a good bond are,—that there should be an obligor and obligee, with a duty to be performed, to which the former is bound by sufficient words, and that the instrument be duly executed.

As to the duty and the words by which it is expressed, it has been laid down that these instruments, being merely acknowledgments of debts, are not necessarily expressed in the usual technical form of a deed, but may be couched in any terms declaratory of the intention of the party to become bound, which will be sufficient, provided the instrument possess the other requisites; hence a mere memorandum, "I, A. B., have agreed to pay J. S. £20," has been held a good bond (Leon. 25). So the following writing, "I do acknowledge to Edward Watson by me £20 upon demand, for doing the work in my garden," was held a good bond (Watson v. Sneed, Vent. 238). And these words, "I am content to give to W. £10 at Michaelmas, and £10 at our Lady-day," was determined to amount to an obligation, and an express engagement to pay (2 Leon. 119).

To make the execution of a bond valid, it must be written or printed on paper, vellum, or parchment, and must be sealed and delivered. But signing is not essential (see 1 L. C. 100), or does it matter by what seal the impression is made (Vin. Abr. Fait. (H.); Perkins, 132; Shep. Touch. 57); or, where there are several parties, if no more than one piece of wax be affixed (Ball v. Dunsterville, 4 T. R. 313). And if the bond be drawn purport-

ing to be executed by several parties, and only one execute it, it will bind him (*Elliott v. Davis*, 2 B. & P. 338); or where it is executed by incompetent parties, as in the case of infants and *feme covert*s, and competent parties' (Roll. Rep. 41); though the incompetent parties will not be bound, yet the others will. It is not necessary that the obligor should himself seal the bond, but anything that amounts to a recognition by him of an impression already made to be his seal will be sufficient (*Powell v. Blackett*, 1 Esp. 97).

No particular form is necessary for the delivery of a bond, the mere throwing it on a table, or any act or word from which the intention of the obligor to put the bond in the possession of the obligee may be inferred, is sufficient (Co. Litt. 36 a; Cro. Eliz. 835). But where, on an issue of *non est factum*, the jury found that the defendant signed and sealed the obligation, and laid it on a table, and that the plaintiff came and took it up, this was held not to be the defendant's deed, without other circumstances found by the jury (*Leon*. 195; Cro. Eliz. 122). A delivery to a third person, for the use of the obligee, makes the bond effectual from the instant of such delivery, although the person to whom the bond is delivered be not the agent of the obligee (*Alford v. Lee*, Cro. Eliz. 54; *Doe. d. Garnons v. Knight*, 5 B. & C. 692). And in the case of a corporation, the affixing their seal without any delivery is sufficient (*Vin. Abr. Fait, J.*).

Where a bond is delivered to a third person to be delivered to the obligee when he should agree to accept it upon the terms on which it

is made, it is considered as an *escrow*, to be delivered to the obligee upon performance of the condition, and then takes effect from the original sealing and delivery; and although the obligor and obligee are both dead before the condition performed, yet, upon the performance of it, the bond is good to charge assets (*Graham v. Graham*, 1 Ves. jun., 274; Bac. Abr. Oblig. C.). If the delivery were to the obligee himself as a bond upon condition performed, it would take effect immediately, notwithstanding the non-performance of the conditions (Co. Litt. 36 a; *Shep. Touch.* 59; *Vin. Abr. Fait, O.*).

A bond will be good though it want a date, or have a false or impossible date; for the date is not of the substance of the deed; and the day of the *delivery*, and not the *date*, is the time from which it operates (2 Co. 5); so that though it be delivered before the day it is dated, it will be good, and may be declared on as of the date of its delivery (2 Co. 4, 6; 3 Keb. 332). So a bond, bearing date in the time of a person's minority, if executed by him after attaining his majority, will bind him (*Shep. Touch.* 72). Where two persons, not being partners, are to give their bond to a third person for the payment of a certain sum of money, and it is wished that in the event of the death of one of the obligors, the obligee should have a legal claim upon the deceased obligor's personal representative, the obligation should be several, or joint and several, and not joint merely. For it is holden that in the case of a joint contract by several persons, if one of the parties die, his executor or administrator is

at law discharged from all liability, and the survivor or survivors alone can be sued (2 Will. Ex. 1239, 2nd. ed.; *Godson v. Go.*, 6 Tau. 594; 6 Beav. 185; *Calder v. Ru.*, 3 Br. & B. 302). And in equity the bond cannot be proved, as such, against the assets of the deceased obligor (*Richardson v. Ho.*, 6 Beav. 185; 2 Will. Ex. 1486, 4th ed.). But if the contract be several, or joint and several, the executor of the deceased contractor may be sued at law in a separate action (2 Will. Ex. 1240, 2nd ed.; *May v. Wo.*, *Freem.* 248; *Hall v. Hu.*, 2 Lev. 228; 3 Mer. 619). Two important cases upon the Statute of Limitations deserve mention here: the first is, as to the effect of an acknowledgment or part payment by one person on the liability of others, and second, as to the effect of an acknowledgment simpliciter without any promise to pay. Under the old law, an action upon a bond might have been brought at any time, subject to the plea of solvit ad diem or solvit post diem, and the law presumed satisfaction where no payment had been made for twenty years. But if upon such plea there was evidence of part payment within twenty years, such evidence rebutted the presumption of law otherwise arising; it seems, though there is no precise authority to that effect, that any payment by a person having any interest, including a tenant for life, would have been sufficient to rebut such presumption. The statute 3 & 4 W. 4, c. 42, imposes a peremptory bar to all actions after twenty years, with the exception in sec. 5, if any acknowledgment has been made either by writing, part payment, or part satisfaction. The further por-

tion of the section shows that it was meant to reserve the remedy specially against the person acknowledging not treating the acknowledgment as setting the whole bond free, but only the action as to the particular party making the acknowledgment. There is no authority for saying that a bond comes within sec. 40 of the 3 & 4 W. 4, c. 27, the words of which section are, "any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent." The case carrying out these observations is, *Roddam v. Mo.* (5 W. R. 347). It appeared that F. M., tenant for life under the will of J. M., who had, in 1826, given a bond to secure payment of £300, paid interest upon the bond debt up to 1847. F. M. died in 1854. Upon bill by the bond creditor, after the death of F. M., to enforce payment of his debt: Held, that the bond debt was not charged upon or payable out of the lands within 3 & 4 W. 4, c. 27, s. 40; that F. M. was not the person liable to pay such bond debt, and had not by payment of interest kept it alive against the inheritance: Held also, that under 3 & 4 W. 4, c. 42, s. 5, the extension to creditors upon bond of the remedy to twenty years after an acknowledgment by writing, or part payment, or part satisfaction, is as against the person making such acknowledgment only, and does not enable the creditor to sue upon the bond generally (*Roddam v. Mo.*, 5 W. R. 347). The second case points out the distinction between simple contracts and specialties as to the requisites for taking a case out of the Statute of Limitations: in the case of a simple contract a mere acknow-



ledgment is not sufficient (*Everett v. Ro.*, 6 L. C. 64; *Smith v. Th.*, 21 L. J. Q. B. 199); but it is otherwise as to a bond. This was decided by V. C. Kindersley, he having held:—

1. That an admission in the answer of the representative of a debtor, that there is a bond debt of the amount claimed remaining unpaid, is sufficient under sec. 5 of the 3 & 4 W. 4, c. 42, to revive such debt though statute run; 2. That the said 5th section refers to any acknowledgment though such acknowledgment does not amount to a cause of action or promise to pay (*Moodie v. Ba.*, 7 W. R. 278).

**BOND POST OBIT.** A bond, the terms of which are to be performed *after the death* of a person therein named.

**BOROUGH-ENGLISH:** The custom which prevails in some ancient boroughs and copyhold manors of lands descending to the *youngest* son instead of the eldest (F. Bk. 6, 7; 3 L. C. 56, 58). The custom applies to remainders and reversions passing by course of descent, and also to uses and executed trusts, but not to executory trusts; thus, where a surrender was made of borough-English lands to the use of trustees in trust, after payment of an annuity and some particular debts to surrender the same to the use of the heirs of the body of the husband and wife, who had two sons: as this was a trust merely executory, the court directed a surrender to be made to the *eldest* son, as heir general by the common law (*Starkey v. St.*, Bac. Abr. "Uses & Trusts," H.; Rob. Gav. by Norw. 47, note). Where the surrender is made to a use it is

different; thus, where copyhold land of the custom of borough-English was surrendered out of court to the use of a man and his heirs, the surrenderee died before admittance leaving two sons, and it was held, that the right descended to the youngest (*Blunt v. Cl.*, 2 Sid. 61; *Vaughan v. At.*, 5 Burr. 2786; *Rider v. Wo.*, 1 Kay & Jo. 644). The custom of borough-English is taken strictly; therefore, the custom does not extend to the youngest brother without a *special* custom (*Muggleton v. Ba.*, 17 L. T. 273; 3 L. C. 56, 58). Where lands in borough-English are given to a man and the heirs of his body, the youngest son will take in tail (*Doe v. Ga.*, 2 B. & Ad. 87; *Trash v. Wo.*, 4 My. & C. 324). So where such lands are let to a man and his heirs during the life of another, and the lessee dies in the lifetime of cestui que vie, the youngest son will be entitled to the lands (Rob. Gav. b. 1, ch. 6; 2 Man. & Ry. 251, n.). Though remainders and reversions passing in course of descent go to the youngest son, this is not the case where a remainder is limited to the heirs or right heirs of a person, by reason whereof such heirs would be considered to take by purchase. Thus, if borough-English lands were, prior to the 3 & 4 W. 4, c. 106, granted or devised to A. for life, remainder to the heirs or right heirs of J. S., who has issue two sons, and dies, and afterwards the tenant for life dies, the eldest son of J. S. was intitled to the land, for he took the remainder by purchase and not by descent (Rob. Gav. b. 1, ch. 6). But now, under the 3 & 4 W. 4, c. 106, s. 4, the result is different, for by that statute, where a limitation

is made by a stranger, either by deed or will, to the right heirs or the heirs of A., the descent must be traced from A. as if he had been the purchaser, so that the youngest son of A. will, it should seem, take the land. And by sec. 3 of the same statute the result will be the same where the owner of the lands limits them by any assurance to himself and heirs or to his heirs, for in such case the statute provides that the owner shall be considered as the purchaser. This is stated differently, but erroneously, in the last edition of Robinson's Gavelkind, p. 70, note. But where a testator devises the lands to his heir, as the heir now takes as devisee (3 & 4 W. 4, c. 106, s. 3) and not as heir, the eldest son will be intitled, he being the common law heir, and taking as the *persona designata*. These points, which are of some novelty and importance, will be more fully explained in an article in the *LAW CHRONICLE*. The course of descent cannot be altered by the owner's grant or devise; that is, he cannot impress upon the land a course of descent according to the common law (2 W. Bl. R. 1228). By the 15 & 16 V. c. 51, s. 34, enfranchised copyholds held in borough-English cease to be subject to the custom of borough-English (see also 4 & 5 V. c. 35, s. 79). The custom binds the sovereign (Rob. Gav. b. 2, ch. 4, note by Norw.). The sovereign cannot by his patent grant or limit that freehold lands shall be of the nature of borough-English, and descendible to the youngest son: in fact, the tenure cannot begin at this day (Rob. Gav. b. 1, ch. 5). Nevertheless, the sovereign or any private person may limit freeholds descend-

ible according to the course of the common law to the heirs of a person, as A., "according to the custom of borough-English," and the youngest son would, at least, prior to the 3 & 4 W. 4, c. 106, have taken the lands, the words being a *descriptio personæ*: still the son would have been in as a purchaser and not by descent, so that it is true that the tenure of borough-English cannot now be originated.

**BOTTOMRY** is in the nature of a mortgage of a ship, when the owner takes up money to *enable* (F. Bk. 212) him to carry on his voyage, and pledges the keel or *bottom* of the ship (*partem pro toto*), as a security for the repayment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but, if it return in safety, then he shall receive back his principal, and also the premium or interest agreed upon, which is always larger than on ordinary loans of money. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender; and in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for money lent (2 St. C. 91, 4th ed.; F. Bk. 212; 2 Bl. C. 457). By the 19 G. 2, c. 37, it is provided, that, in the East India trade, the lender of money on bottomry, or at *respondentia*, shall alone have the right to be insured for the money lent, and the borrower shall, in case of a loss, receive no more upon any insurance than the surplus of his property above the value of his bottomry or *respondentia* bond (Selw. N. P. 1036, 11th ed.).

It has been above stated that the owner takes up money upon bottomry, but it must be borne in mind, that in a foreign country, in the absence of the owners, the master may take up money upon bottomry for the use of the ship; as where a ship, being on a voyage from Bengal to London, was obliged to put back to Bombay to repair (*Selw. N. P.* 1034, 11th ed.). The master of a ship has authority by law to pledge the credit of his owner, resident in England, for money advanced to the master in an English port where the owner has no agent, if such advance of money was necessary for the prosecution of the voyage; and whether it was so or not is a question for the jury (*Arthur v. Ba.*, 6 M. & W. 138). Mr. Just. Patteson, in *Johns v. Si.* (2 Q. B. 425), said, "I held in *Arthur v. Ba.*, that, to justify the master in borrowing, it is not necessary that the occasion should arise in a foreign country; but the case must be one of pressing necessity, and where the master and owner cannot communicate without very great prejudice and delay." The necessity for such communication, when possible, was enforced in *Wallace v. Fi.* (7 Moo. P. C. 408; 4 L. C. 270). Some important points were decided in the late case of *The Royal Arch* (6 W. R. 191; 4 L. C. 270), and among others the following: that a bottomry bond cannot be granted for a debt incurred on a former voyage; that a bond may be given, though money has not actually been advanced, to a person who has pledged his own credit for the expenses incurred; that the master cannot, even with the consent of the owner, grant a bottomry bond suable in the High

Court of Admiralty, upon a British ship lying in a *British* port for a new voyage (4 L. C. 270). Whilst the usury laws were in force, it was allowed on a bottomry bond to take more than the legal rate of interest by way of recompense for the risk run. This recompense was in the civil law properly termed "*periculi pretium*." The term "*bottomry*," is derived from the original language of the agreement, which merely mentioned the keel or bottom of the ship; but the expression was always considered as used figuratively—namely, *pars pro toto*. This agreement is sometimes made in the form of a deed-poll, called a bill of bottomry, executed by the borrower, and sometimes in the form of a bond with a penalty. It has been said, that such instruments being in the language of commercial men, and not of lawyers, should receive a liberal construction, to give effect to the intention of the parties (*Simonds v. Ho.*, 3 B. & Ad. 50).

**BOUND BAILIFFS.** Sheriff's officers, who serve writs, make arrests, &c. The sheriff being answerable for the misdemeanors of these bailiffs, they are therefore usually bound in an obligation with sureties for the due execution of their office, and are thence called bound bailiffs (1 Bl. C. 345, 346; 2 St. C. 639; *ante*, p. 46; 10 Ad. & El. 23).

**BREACH.** The breaking or violating of any thing, either by commission or omission; thus, breach of close is the unlawful entry on another person's soil or land, or close, technically termed *trespass quare clausum fregit* (3 St. C. 488); breach of covenant is the non-per-

formance of any covenant agreed to be performed, or the doing of any act covenanted not to be done (1 St. C. 492, 517; F. Bk. 136, 146); breach of duty, the breaking or violating any duty; breach of peace, the breaking or disturbing of public peace (4 St. C. 314); breach of pound, the breaking any pound or place where cattle or goods are deposited (3 St. C. 348); breach of contract or promise, the breaking or non-performance of one's contract or promise (3 St. C. 520, 4th ed.).

**BREACHES, ASSIGNING.** At common law, the judgment for plaintiff in debt on bond, was, in all cases, that he should recover his debt. In cases where the bond was conditioned, not for the payment of money, but for the doing of some collateral act, such as the performance of covenants in another deed, or the like, this practice was often very inconvenient, sometimes very unjust. To remedy this, by the 8 & 9 W. 3, c. 11, s. 8, in actions on bond, or any penal sum, for non-performance of any covenants or agreements contained in any deed or writing, the plaintiff shall assign breaches, and the jury shall assess damages for the same. It is immaterial whether the agreement, &c., be contained in the condition of the bond, or some other instrument. It extends to an annuity bond; to a bond conditioned to perform an award; or to pay money by instalments; or to perform any covenant or agreement in any other deed or instrument. But it does not extend to a warrant of attorney to secure an annuity; nor a post obit bond; nor to bail bonds; nor to replevin bonds; nor to bonds conditioned for

the payment of any gross sum of money (1 W. Saund. 58; 2 Id. 187 a.). The declaration either states only the penal part of the bond, as in the case of common money bonds, or it sets out also the special conditions and alleges breaches. The allegation of breaches is either in the declaration or replication by way of assignment, which is traversable, or, in certain cases, by way of suggestion, which is not traversable, but must be proved in order to obtain an assessment of damages. The 8 & 9 W. 3, c. 11, is unaffected by the C. L. P. Act, 1852, s. 96, "as to the assignment or suggestion of breaches," or "as to judgment for the penalty as a security." The only difference is, that instead of setting out the conditions on oyer where breaches are not assigned in the declaration, the defendant must now set out the conditions as part of his plea if he intends to plead performance. Where issues are joined on the alleged breaches, the proof will, of course, depend on the allegation traversed. Where breaches are suggested, the evidence is the same as on a writ of inquiry, except that the truth of the breaches as well as the damages must be inquired into, and thereupon the defendant may then controvert the breaches or any of them; but he cannot show excuse of performance, for that might have been pleaded by him at first (see *Canterbury v. Ro.*, 1 C. & M. 690; *Webb v. Ja.*, 8 M. & W. 645). Where the breaches have been suggested on the roll after judgment for the plaintiff it is necessary to give some evidence that the bond produced, and in which the conditions are contained, is the same as that on

which judgment has been obtained; for this purpose it is sufficient if the attorney for the plaintiff testifies that the bond produced is the instrument delivered to him to bring the action on, and that he knows of no other of the same date, and the attesting witness need not be called (*Hodkinson v. Ma.*, *Peake Ev.* 287, 5th ed.; 2 *Camp.* 122). The jury find nominal damages and costs, as well as damages on the breaches, but the plaintiff cannot recover more than the amount of the penalty and costs (*Wilde v. Cl.*, 6 *T. R.* 303; *Banscombe v. Sc.*, 6 *Q. B.* 18).

**BREACH OF PRIVILEGE.** A breach of privilege is a contempt of the High Court of Parliament, whether relating to the House of Lords or the House of Commons. Both branches of the Legislature act on the same grounds; both declare what are and what are not breaches of their privileges, when the question is raised, and both punish, by commitment or otherwise, as the courts of law and equity do for contempt (*Stockdale v. Ha.*, 9 *Ad. & El.* 253). The most important of the privileges of Parliament are—1. Privilege of speech; 2. Freedom from arrest in civil suits (2 *St. C.* 346—352, 4th ed.; *F. Bk.* 16, 17). Resistance to the officers of the Houses of Parliament has in almost all cases been treated as a breach of the privileges of Parliament. However, it is now settled, that when a person sued in a court of law for an alleged violation of private right pleads that the act was done under the authority of either House of Parliament, the court of law is not precluded, on the ground of parliamentary privilege,

from considering whether the authority of the House constitutes, in point of law, a sufficient justification of the act, nor from giving judgment in favour of the plaintiff, if it considers the justification insufficient (*Stockdale v. Ha.*, 11 *Ad. & El.* 253; *Howard v. Go.*, 10 *Q. B.* 359). The presence of strangers is a breach of privilege, though permitted on sufferance; and formerly, to take a note of any of the proceedings was a high act of contempt, although now the representatives of the newspaper press are not only allowed to be present for that purpose, but have a gallery to themselves in each house, and every accommodation afforded them which the courtesy of the chief officers of both can render.

**BREAKING OPEN DOORS, ARRESTS.** The maxim of the civil law is, "*Nemo de domo sua extrahi debet*;" of the English law it is, "Every man's house is his castle" (*Semayne's Ca.*, 5 *Co. Rep.* 91). An officer, in the execution of civil process at the suit of a subject, is not justified in breaking open the outer door of a house in which the party against whom the process is issued, or the goods of such party, is or are, but having once gained admission into the house the officer may break open inner doors (3 *St. C.* 654, 657, 4th ed.; *Chit. Archb. Pract.* 549, 8th ed.; *Pugh v. Gr.*, 7 *Ad. & El.* 827; *Morrish v. Mu.*, 13 *M. & W.* 52). So, if having made an arrest, the party escape from the officer, the latter may follow his prisoner, and break open the outer door, if necessary (*Broom's Max.* 327, 2nd ed.; *Ago K. M. v. Qu.*, 3 *Moo.* 164; 4 *L. C.* 176; *Com. L. Pract.* 89,

253; *Sandon v. Je.*, 6 W. R. 690). An officer may break open the outer door, in order to execute a warrant for treason, felony, or actual breach of the peace, if, on demand, admission cannot otherwise be obtained (1 Chit. Cr. L. 49; *Rawlins v. El.* 16 M. & W. 172). So a constable may without warrant, in cases of a reasonable charge of treason, or felony, or of a dangerous wounding whereby felony is likely to ensue, or upon his having a reasonable suspicion that any of such offences have been committed, after demand, break open an outer door to arrest the party so charged or suspected. But a private person cannot, on mere suspicion, justify breaking open an outer door in even a criminal case (4 St. C. 410, 412, 413, 4th ed.; 4 Bl. C. 292; *Smith v. Sh.*, 3 C. B. 142). An officer may, if necessary, break open an outer door, in order to execute a *habere facias possessionem* on a recovery in ejectment. So in the execution a warrant from a county court in a proceeding for the recovery of tenements under the statutes (*Broom's Max.* 323, 324). In the case of goods fraudulently removed to avoid a distress for rent then due, the outer door of the house to which the goods have been removed may be broken open (*Woodf. L. & T.* 337, 5th ed.). The privilege attaching to the outer door is confined to a person's dwelling-house, and does not extend to barns or outhouses unconnected therewith (*Penton v. Br.*, 1 Sid. 186).

**BREVIATES OF BILLS.** A *breviate* of a bill in Parliament is an epitome of its contents. In compliance with an order of the House

of Commons, made in 1651, with every bill which is printed a *breviate* of its provisions is also prepared and printed, in order that such provisions may be ascertained without the trouble of reading the bill itself in *extenso*.

**BRIBERY.** The crime of offering or taking any undue reward or remuneration to or by any judge or public officer of the Crown with a view to influence his behaviour. The taking such reward is as much bribery as the offering it. The offence is not confined, as some have supposed, to *judicial officers* (4 Bl. C. 140). With respect to bribery at *elections*, the 17 & 18 V. c. 102 (continued until 1859; 5 L. C. 157), enacts that the offence shall be, as regards the briber and bribee, a misdemeanor, and that in addition to the fine or imprisonment consequent on the misdemeanor, the former shall be liable to forfeit £100, and the latter, £10.

**BRIDGES.** The expense of maintaining bridges is defrayed, not by the parishes, but by the counties at large, in which the bridges are situate (*R. v. Southampton*, 17 Jur. 254; 21 L. J. M. C. 201; see 4 & 5 V. c. 49; 13 & 14 V. c. 64). And this is so as to bridges built by a private individual before 43 G. 3, c. 59, if the public use the same (14 Jur. 956; *McKinnon v. Pe.*, 18 Jur. 513; 1 L. C. 60). And where the parish is bound by prescription (as is sometimes the case, 4 B. & Ad. 62) to repair a bridge, there is a statutory provision which gives effect to any contract between the county and the parish, for performing the repairs in future at the

expense of the former, and relieving the latter from the charge. The liability of the county at common law extended not only to the bridge itself, but to so much of the road as passed over it, and even to so much as formed its ends or approaches. And by 22 H. 8, c. 5 (14 Jur. 956), the county was bound to repair three hundred feet either way from the bridge. And this is still the state of the law as to all bridges built prior to 5 & 6 W. 4, c. 50. But by sec. 21 of that act, it is provided that in the case of all bridges *thereafter* to be built, the repair of the road itself passing over or adjoining to a bridge shall be done by the parish or other parties bound to the general repair of the highway of which it is a part; the county still being, nevertheless, subject to its former burden as regards the walls, banks, or fences of the raised causeways, and raised approaches to any bridge, or the land arches thereof (3 St. C. 233, 4th ed.; 13 Jur. 422; 1 L. C. 60. As to repair of bridges, *ratione tenuræ*, see 2 G. & D. 435). Where a public bridge is out of repair, and the liability to repair it is disputed, the usual mode of proceeding is by indictment. Where the grand jury have wrongly refused to find a bill, an information may be filed (see *R. v. Upton*, 11 Jur. 806; *R. v. Barnwood*, 16 L. J. M. C. 84). The indictment is to be preferred, by order of the justices, against the parish or party charged before them, at the next assizes or quarter sessions for the county or place where the highway is situate (5 & 6 W. 4, c. 50, s. 95, amended by 4 & 5 V. cc. 51, 59). And it has been decided, that a justice of the peace, either upon his own view or upon informa-

tion upon oath, may make a presentment of any county bridge not duly repaired to the sessions; the provision to that effect in the 13 G. 3, c. 78, s. 24, though repealed by the 5 & 6 W. 4, c. 50, being incorporated in the 43 G. 3, c. 59, s. 1, which is not repealed (*R. v. Brecon*, 13 Jur. 422; 18 L. J. M. C. 123). No action will lie against a county surveyor by an individual to recover damages for a personal or pecuniary injury, resulting from the non-repair of the county bridge (*M'Kinnon v. Pe.*, 18 Jur. 513; 23 L. J. M. C. 97). It has been decided that bridge-tolls, which do not arise from the mere user of lands, but are granted to a bridge company, as a franchise, by act of Parliament, are hereditaments of themselves, and liable to be assessed as tolls to the *land tax* (*Charing Cross B. Co. v. Mi.*, 1 Jur. N. S. 608; 24 L. J. Q. B. 74).

**BRIEF.** An abridgment of a plaintiff's or a defendant's case written out for the instruction of counsel on a trial or hearing. When a plaintiff in an action has made up his mind to try it, he must prepare his briefs and evidence. The brief contains a statement of the proceedings in the action (called the pleadings), a brief history of the cause of the action, and the evidence that he has to support it; and this is delivered to the counsel whom the party intends to employ (*Smith's Action at Law*, 73).

**BROKERS.** There are various sorts of brokers. The sale of goods is frequently effected by a broker, being an agent remunerated by a commission, having no possession or

apparent ownership of the goods, and acting ostensibly as an agent between two contracting parties (2 St. C. 76, 4th ed.). In the city of London (2 L. C. 337), brokers must be licensed by the mayor and aldermen before they can lawfully carry on business (See *Robinson v. Ki.*, 25 L. J. Ch. 441; 2 Jur. N. S. 294). A broker acting for two principals, like an auctioneer, is the agent of both, and a memorandum made by him of the bargain is a sufficient compliance with s. 17 of the Statute of Frauds to make the contract of sale binding on each principal (*Simon v. Me.*, cited in 7 Ea., 569). In like manner, the memorandum in a broker's book, and the bought and sold notes transcribed therefrom, and delivered to the buyers and sellers respectively, are sufficient to bind the bargain, the broker being considered the agent of both parties (*Selw. N. P.* 870 n., 11th ed.). If the broker deliver a different note of the contract to each party contracting, there is no valid contract. Each is bound by the note which the broker delivers; and if different notes are given to the parties, neither can understand the other (per *Gibbs, C. J.*, *Holt's N. P. C.* 172; *Gregson v. Ru.*, 737; *Cowie v. Re.*, 5 Moo. P. C. R. 232; *Rosc. Ev.* 347, 9th ed.). The notes are said to be (if not the contract itself), the proper evidence of the contract, and they are admissible, though the entry in the broker's book has never been signed by him (*Goom v. Af.*, 6 B. & C. 117). But if the entry in the book has been signed, it is questionable whether this is not the best evidence, as being the original entry of the contract, the bought

and sold notes being (strictly) only notices of what has been done by the broker (*Sievwright v. Ar.*, 17 Q. B. 115; *Rosc. Ev.* 347, 7th ed.; *Selw. N. P.* 871, 11th ed.). Alterations in the note by either party will be fatal (see *Moore v. Ca.*, 23 L. J. Ex. 310).

There are brokers who are also styled *appraisers*, and whose interference is necessary in some transactions; as on a distress for rent before sale, the distress must be appraised by two sworn appraisers or brokers (see *Allen v. Fl.*, 10 Ad. & El. 640, over-ruling *Fletcher v. Sa.*, 1 M. & R. 375; *Selw. N. P.* 682—685, and notes, 11th ed.). The fees of such brokers are regulated by statute. The broker making the distress must furnish a copy of his charges (*Hart v. Le.*, 1 M. & W. 560; 57 G. 3, c. 93, s. 6; 3 St. C. 350, 351, 4th ed.).

*Stock-brokers* must in London, be licensed, as above-stated, and unless so licensed, they cannot maintain an action for commission, &c., for buying and selling stock (*Cope v. Ro.*, 2 M. & W. 149; *Rosc. Ev.* 425, 7th ed.; *Com. L. Princ.* 198, et seq.). As stock is usually sold for ready money only, a broker employed to sell stock cannot sell it on credit, without a special authority, although acting *bonâ fide* and with a view to the benefit of his principal (*Wiltshire v. Sj.*, 1 Campb. 258). A person who employs a broker on the stock-exchange impliedly gives him authority to act in accordance with the rules there established, although such principal may himself be ignorant of the rules (*Sutton v. Ta.*, 10 Ad. & El. 27; *Selw. N. P.* 820, 11th ed.).

A *bill-broker* is not a person



known to the law with certain prescribed duties, but his employment is one depending entirely on the course of dealing. It may differ in different parts of the country; it may have bounds more or less extensive in one place than in another. What is the nature of his powers and duties in any instances is a question of fact, and is to be determined by the usage and course of dealing in the particular place. A bill broker, who receives a bill merely for the purpose of procuring it to be discounted for his customer, has no right to mix it with bills of his other customers, and to pledge the whole mass as a security for the advance of money (*Haynes v. Fo.*, 2 Cr. & M. 239; *Foster v. Pe.*, 5 Tyr. 265; *Selw. N. P.* 822, 11th ed.). A bill-broker who takes a forged bill to a money-dealer to be discounted, although he does not indorse the bill, and is not cognisant of the forgery is liable to repay the money received for the bill (*Gurney v. Wo.*, 1 Jur. N. S. 328; 24 L. J. Q. B. 46).

A broker, as above stated, is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal who trusts a broker has a right to expect that he will not sell in his own name. The buyer cannot, therefore, set off a debt due from the broker to him in action for the price by the principal (*Baring v. Co.*, 2 B. & Al. 137; *Rosc. Ev.* 457, 7th ed.; *Selw. N. P.* 821, 822, 11th ed.).

A broker contracting in such a form as to make himself personally responsible, cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsi-

bility (*Jones v. Li.*, 6 Ad. & El. 490; *Humfrey v. Da.*, 26 L. J. Q. B. 127; *Higgins v. Se.*, 8 M. & W. 845; *Selw. N. P.* 823, 11th ed.; *Rosc. Ev.* 353, 7th ed.).

In an administration-suit, the amount of the forfeiture of a broker's bond was held to be equitable assets for the benefit of all the creditors, and not merely for those in respect of transactions of brokerage (*Naish v. Bryant*, 6 W. R. 573; 4 Jur. N. S. 550).

As to *pledges* or *fraudulent dealings* by brokers, see 2 L. C. 337; 4 L. C. 154—156; *ante*, pp. 14, 15, 50, with respect to agents and bankers, which will apply to brokers (*F. Bk.* 322—324; 4 L. C. 154—156; 4 St. C. 200—202, 4th ed.; 4 G. 4, c. 83; 6 G. 4, c. 94; 5 & 6 V. c. 39). The provisions of these last statutes may be thus concisely stated:—

*Advances, &c., to brokers or factors, &c.*, entrusted with the goods on which they have obtained advances, without knowledge of their agency character, are effectual against the real owner of the goods. Sales of goods by a person entrusted with a bill of lading, &c., are in similar circumstances, also effectual.

*Payments to agents entrusted with goods* are effectual, though the party purchasing from, and paying them, had notice of the agency, the same being *bonâ fide*.

*Pledge by agent of goods entrusted to him*, by way of security for advances, are valid against the real owner though the pledgee had notice of the agency, but not that he had no authority so to pledge or his acting *malâ fide*. To deprive the pledgee of the protection of the above provision he must be fixed with knowledge that the agent is

acting *malâ fide*, and beyond his authority, and no mere suspicion will amount to notice, nor will the knowledge that the agent has power to sell the goods constitute notice that he has not power to pledge them (*Navielshaw v. Br.*, 16 Jur. 979; 21 L. J. Ch. 908).

**BUDGET.** The general financial statement, annually made by the Chancellor of the Exchequer in the House of Commons, is so termed. It usually embraces a review of the income and expenditure of the last year, as compared with those of preceding years; remarks upon the financial prospects of the country; and an exposition of the intended repeal, modification or imposition of taxes during the session; a detail of the current expenditure during the current period, with its grounds of justification; an account of all operations relating to the national debt, and finally the excess of income over expenditure, or vice versa, as the case may be, accompanied by such observations as the occasion may seem to require (*Dodd's Parl. Comp.* 70; *May's Treat. of Parl.* 331).

**BURGAGE TENURE.** Tenure in *burgage* is described by Glanvil, and is expressly laid down by Littleton, to be but tenure in socage: and it is where the King or other person is lord of an ancient borough, in which the tenements are held by a rent certain, and in which certain peculiar customs exist; as that the lands shall descend to the *youngest* son; that the wife shall have dower of *all* her husband's lands; that the lands were always *devisable* (1 St. C. 211—214, 4th ed.). It is, indeed, only a

kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. A borough is usually distinguished from other towns by the right of sending members to Parliament; and where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. It is therefore a tenure proper to boroughs, whereby the inhabitants by ancient custom hold their lands or tenements of the King, or other lord of the borough, at a certain yearly rent (2 Bl. C. 82).

**BURGESSES.** Properly the inhabitants or persons in trade within a borough; but now those are usually called *burgesses* who serve in Parliament for any such borough or corporation (1 Bl. C. 174). By the Municipal Corporation Act (5 & 6 W. 4, c. 76), the definition of a burgess in the boroughs comprised in the Act is a male person of full age, not an alien, nor having received within the last twelve months parochial relief, or alms, or pensions, or charitable allowance from the charitable trustees of the borough; who, on the last day of August in any year shall have occupied any house, warehouse, counting house, or shop within the borough during that year and the whole of the two preceding years; and during such occupation shall also have been an inhabitant householder within the borough or within seven miles thereof; and shall during such time have been rated to all rates for the relief of the poor, and have paid all such rates and all borough rates in respect of the same premises, except those payable for the last six calendar months; and shall be duly

inrolled in that year as a burgess on the burgess-roll (3 St. C. 152, 153, 4th ed.).

**BURGLARY.** A burglar is one th. by night breaks and enters into another's dwelling house with intent to commit a felony. Burglary, therefore, must be, first, in the *night-time*, that is, by 7 W. 4, and 1 V. c. 86, s. 4, after nine of the clock in the evening, and before six of the clock in the morning; secondly, the crime must be committed in a mansion or dwelling-house, or in a building communicating therewith; for by 7 & 8 G. 4, c. 29, s. 13, no building, although within the same curtilage with the dwelling-house, shall be deemed part thereof for the purpose of burglary, unless there shall be a communication with such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from one to the other; thirdly, there must, in order to make it burglary, be both a breaking and an entry to complete it, or a breaking out after an entry to commit felony, or being therein and committing a felony (7 & 8 G. 4, c. 29, s. 11); fourthly, the breaking and entry must be with a felonious intent 4 Bl. C. 224, et seq.; 4 St. C. 174—180, 4th ed.; 3 L. S. M. N. S. 183). By the 7 & 8 G. 4, c. 29, if any person enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case *break out* of the said dwelling-house in the night-time, such person shall be deemed guilty of burglary. As to what constitutes an entry into a dwelling-house, it has been decided, that

entering through an open window, although with a felonious intent, will not constitute burglary, but pushing up an unfastened window with such intent will be a sufficient breaking to constitute burglary (4 Stew. Com. 258; Reg. v. Hyams, 7 C. & P. 441; Archb. Cr. Pl. & Ev. 304, 8th ed.). An entry through a hole in the roof of a house, although left for the purpose of letting in light, will not constitute housebreaking; although an entry through a chimney will, for that is as much closed as the nature of things will permit (R. v. Lewis, 2 C. & P. 628). An entry by lifting up a flap to a cellar, which flap is no otherwise secured than by its own weight, constitutes a burglary (R. v. Russell, 1 Moo. C. C. 377; 1 Exam. Answ. p. 15, No. IX.). On the trial of an indictment for burglary, the prosecutor must prove—1. The breaking; 2. The entering (if the indictment be for breaking and entering); 3. That the house broken and entered was a mansion-house—i. e., either a dwelling-house, or some building between which and the dwelling-house there was a communication, either immediate or by means of a covered and inclosed passage leading from one to the other (7 & 8 G. 4, c. 29, s. 13); 4. That the breaking and entry, or breaking out, were in the night-time—i. e., between nine in the evening and six in the morning (1 V. c. 86, s. 4). 5. That the breaking and entry were with the intent to commit a felony, or the being in and committing a felony, and afterwards breaking out (Archb. Cr. Pl. & Ev. 297—311, 10th ed.; Roscoe's Ev. 802, et seq., 2nd ed.). There exists much contradiction in the

cases respecting proof of entry, as the two following cases will show. On an indictment for burglary where any part of the person of the prisoner is within the dwelling-house, no matter with what immediate intent, there is a sufficient entry to constitute the offence, and, therefore, where the hand was proved to have been inside the house; it was held immaterial whether it was there for the purpose of lifting up a window or of abstracting property. But where no part of the prisoner's body is inside the premises, but he introduces an instrument within it for the mere purpose of effecting an entry, and not with any other object, *semble*, the entry is not complete (*Reg. v. O'Brien*, 4 Cox, 398). On an indictment for burglary, it was proved that the legs of the prisoner were seen hanging about a foot from the ground, from a window, and no other part of his body was visible till he jumped down and ran away. It was held by Coltman, J., that though it appeared there was a hole broken in the window large enough to admit a man's head and shoulders, there was no evidence to show that there had been any actual entry, no property being lost (*Reg. v. Meal*, 3 Cox, 70). If there be any doubt as to the nature of the building broken and entered, a count may be inserted for breaking and entering a building within the curtilage; for the 7 & 8 G. 4, c. 29, s. 14 (amended by 1 V. cc. 86, 90), enacts, that if any person shall break and enter any building, and steal therein any chattel, money, or valuable security, such building being *within the curtilage of a dwelling-house*, and occupied therewith, but not being part thereof according to the provisions

of the above 13th section, every such offender being convicted thereof, either upon an indictment for the same offence, or upon an indictment for burglary, house-breaking, or stealing to the value of five pounds in a dwelling-house, *containing a separate count for such offence*, shall be liable at the discretion of the court to penal servitude for any term not exceeding fifteen years, nor less than ten, or to be imprisoned for any term not exceeding three years, to which imprisonment, hard labour, and solitary confinement may be superadded (16 & 17 V. c. 99; 20 & 21 V. c. 3). As to the punishment for burglary, by 7 W. 4, and 1 V. c. 86, s. 2, whoever shall burglariously enter into any dwelling-house, and shall assault with intent to murder any person being therein, or shall cut, stab, wound, beat, or strike, such person, shall be guilty of felony, and punishable with death. By sec. 3, the simple crime of burglary is punishable only with penal servitude for life, or for not less than ten years, or imprisonment for not more than three years, with hard labour and solitary confinement (16 & 17 V. c. 99; 20 & 21 V. c. 3).

**BY-LAWS.** Every corporation has power to make by-laws. This power, like the power of suing, or the capacity of being sued, is included in the very act of incorporation; and it is not necessary, although usual, for the Crown to confer this power in express terms (*Hob. 211*). It is incident to the whole body of every corporation; and, therefore, if a charter gives to a select body power to make by-laws touching certain matters therein spe-

cified, it does not take away from the body at large their incidental power to make by-laws touching other matters not specified in the charter (*R. v. Westwood*, 4 B. & C. 781; 7 Bing. 1). Where a corporation is by charter, such by-laws may be made as will enforce the end of the charter in a way more convenient, and tending more to the care and good government of the society, than what the charter has prescribed. Hence, where it is directed by the charter, that the mayor or aldermen, or other principal officers, should be chosen by the burgesses, or commonalty at large, the corporation may, by common assent, for the purpose of avoiding popular confusion, make a by-law restraining the power of election to a select number of burgesses or commonalty (*Case of Corporation*, 4 Russ. 77, b; see also *Bather v. Boulton*, 1 Str. 314; *R. v. Bird*, 13 East, 375)—that is, where the right of the election is given to a whole class of men, they may restrain it to a part of themselves (see *R. v. Powell*, 18 Jur. 771; 23 L. J. Q. B. 199). But where the corporation consists of several integral parts, as, first, the mayor; secondly, the aldermen; thirdly, the commonalty;—and the right of election is given to the three parts conjointly, a by-law excluding one integral part from the right of election—*e. g.*, the commonalty, is void (*R. v. Head*, 4 Burr. 2515). It is essential to the validity of a by-law that it should be consistent with, and that it should not be repugnant to, or contradict the charter; for in a case where the charter directed that the mayor and aldermen or the major

part of them, should yearly nominate four of the burgesses, or inhabitants, to the commonalty at large, out of whom they were to elect one to be mayor, and who, at the end of his year was to be an alderman; it was holden, that a by-law, providing that an alderman, who was an inhabitant, might be elected mayor, was bad, inasmuch as it was inconsistent with the charter; because it was not intended that aldermen who were to nominate the candidates for the mayoralty, and who were to commence aldermen by serving the office of mayor, should be chosen mayors, because they happened to be inhabitants (*R. v. Tucker, Esq.*, 14 G. 2, M.S., *Serjeant Hill*, vol. 27, p. 184). A by-law, though made by the whole body, if it narrow the number of those out of whom the election is to be made, is void. Hence, where the power of electing the mayor was given by the charter, to the mayor, burgesses, and commonalty, who were to choose the mayor out of the burgesses, and a by-law directed that the mayor and common council, or the major part of them of which the mayor was to be one, should elect one of the common council to be mayor; it was holden, that such by-law was bad, because it was competent to a corporation to make such ordinances only as are for the better government of the corporation: and the present by-law was prejudicial, inasmuch as it confined their choice, for, on the terms of the charter, they were at liberty to choose out of the burgesses at large. And *Lee, C. J.*, observed, that a corporation could not alter the charter as to the persons eligible, neither could they set up another government than the charter had

prescribed (*R. v. Phillips*, 3 Burr. 1836); so a by-law extending the number of persons eligible, if it varies the constitution of the corporation as prescribed by the charter, is bad (*R. v. Bumstead*, 2 B. & Ad. 699; see *R. v. Attwood*, 4 B. & Ad. 481; 1 Nev. & M. 286). And upon the same principle, a by-law directing that no person shall be elected mayor a second time within six years has been holden to be void (*R. v. Mayor of Cambridge*, 23 Geo. 3, M.S.). A by-law made by a part of the corporation to deprive the rest of the right of electing without their assent is bad. Hence, where by the charter the power of electing common councilmen was given to the mayor, jurats, and commonalty, and a by-law was made by the mayor, jurats, and common council, restraining the election of common councilmen to the mayor, jurats, such of the commonalty as were of the common council, and sixty others who were senior common freemen, the by-law was holden to be bad (*R. v. Cutbush*, 4 Burr. 2204). A by-law cannot explain a doubtful charter if there be any ambiguity on the face of the charter; it is the province of the court to expound it. A by-law which gives a voice in the election to any person to whom it was not given by the constitution of the borough is bad (*R. v. Bird*, 13 East, 387). It remains only to observe, that a by-law may be good in part and bad in part, provided the two parts are entire and distinct from each other (*R. v. Fishermen of Faversham*, 8 T. R. 365). Although there do not remain any traces of a by-law in the corporation books, and although there can-

not be any proof given of the loss of it, yet, upon evidence of constant usage, a jury may be directed to presume its existence (see 2 Ves. 380; *Thompson v. Da.*, 17 Jur. 773; 22 L. J. Ch. 507; *R. v. Head*, 4 Burr. 2518; and *R. v. Bird*, 13 East, 368, where the defendants pleaded a by-law not then extant in writing). Sixty years' usage has been considered as evidence of a by-law. (Per Lord Mansfield, C. J., in *Perkins v. Master, &c.*, of Cutlers, 21 M.S., Serj. Hill, p. 65; Selw. N. P. 1173—1177; 1 Bac. Abr. 802—812, 7th ed., tit. "By-laws;" Com. Dig., tit. "By-laws").

By the Municipal Corporation Act (5 & 6 W. 4, c. 76, s. 90) the council of any of the boroughs mentioned in the schedules of that act are empowered to make such by-laws as to them shall seem meet for the good rule and government of the borough, and for the suppression of all such nuisances as are not already punishable in a summary manner by virtue of any act in force throughout such borough, and to appoint such fines as they shall deem necessary for the prevention of such offences, under certain limitations.

It is not clear that an incorporated railway company has, as incidental to its existence, the power of making by-laws, and if it has, whether that general power is taken away by its charter or act of incorporation, giving the company powers to make by-laws on certain defined subjects (*Chilton v. Lo. & C. R. Co.*, 11 Jur. 149; 16 L. J. Ex. 89; see the case of a bad by-law, 1 L. C. 242). Every railway company must lay before the Board of Trade, for their approbation, certified copies of the by-laws and regulations by which

the railway is governed, which by-laws may be disallowed by the Board at its pleasure (3 & 4 V. c. 97, ss. 7, 8).

Local Boards of Health have no general power to make by-laws for carrying out the purposes of the act, but only such by-laws as are authorised by s. 55 of the 11 & 12 V. c. 63 (Reg. v. Rose, 1 Jur. N. S. 802; 24 L. J. M. C. 180).

Where in any trading corporation, by prescription there is one governing body which has been used to make general orders, and another which has been used to regulate the business of the corporation, but which does not appear to have exercised the power of making general orders, it is questionable whether the latter body has power to make a general order for regulating the business of the corporation. imposing on their members conditions under which they are to hold advantages secured to them by general orders made by the other governing body. *Seem*, that the one has rather a legislative, and the other an executive province; the latter having only power to regulate in particular cases, not to make a general regulation. But if by such a general order a regulation be made, laying down a condition on which the members are to enjoy an advantage they possess under general rules of the corporation, and on breach of which they are no longer to enjoy it, although it may be doubtful whether such a case is governed by all the principles of law which apply to by-laws imposing penalties or forfeiture, the order or rule will be invalid, because unreasonable and unjust, unless distinct notice of its terms be given by the governing

body which issues it to all the members of the corporation who are affected by it; and, at all events, it cannot be enforced against one who had not such notice of its terms (Hills v. Hu., 2 C. L. R. 1781).

It has sometimes been said that the claim to a penalty under a by-law arises from something in the nature of a specialty, but it is now established that the liability under a by-law is founded upon consent, which is in the nature of a simple contract (Tobacco Pipe Makers v. Lo., 15 Jur. 1194). The action for recovering the penalty is therefore within the 21 Jas. 1, c. 16, s. 8, and must be brought within six years (Ibid.).

**BY STATUTE.** This phrase is frequently used in contradistinction to the phrase "at common law," meaning by express parliamentary enactment as distinguished from the common law of the land. Thus a man has sometimes two remedies for the same injury, either of which he may pursue; one provided by the express enactment of the legislature, the other by the common law of the land, in which case he would be said either to pursue the remedy given him *by statute*, or that which lay for him *at common law*. As stated in Com. Dig. (tit. "Action upon Statute," C), where an action is maintainable at common law, and an action is also given by statute, without expressly or impliedly taking away the common law right, an action at common law as well as upon the statute may be maintained. Where, however, a statute creates a *new right*, and a particular remedy is mentioned, none other can be adopted (Stevens v. Je., 12 Jur.

477; F. Bk. 22; but see *Collinson v. Ne. R. Co.*, *infra*). These rules are well exemplified by a case, where it appeared that by a railway act it was provided "that nothing in this act contained shall authorise the company to take, injure, or damage, for the purposes of the act, any house or building which was erected on or before the 30th of November, 1835, without the consent in writing of the owner or other person interested therein, other than such as are specified in the schedule to the act annexed, unless the omission proceeded from mistake." The act also provided for the settling of differences between the company and the owners and occupiers of any lands taken, used, damaged, or injuriously affected by the execution of the powers granted by the act, and for the payment of satisfaction both for damages sustained, and for future temporary or recurring damages. The company, in the execution of the powers of their act, had erected a railway station and embankment near a house used as a starch manufactory, and had thereby obstructed its lights, and caused damage to it by the dust and dirt drifted from the station, &c. The house was erected before the 30th of November, 1835; had not been specified in the schedule, nor omitted therefrom by mistake, and no consent in writing to the construction of the station or embankment had been obtained from the owner or any other person interested in the house: Held, that the company were liable in an action on the case at the suit of the reversioner for such damage, and that the plaintiff was not confined to the remedy provided by the act for com-

pensation (*Turner v. Sh. and R. R. Co.*, 10 M. & W. 425; see *Marshall v. Ni.*, 16 Jur. 1155; 21 L. J. Q. B. 349). A remedy by summary proceedings before justices does not always prevent the party from bringing an action. Thus, where a railway act enacted that any penalty imposed thereby, the recovery of which was not otherwise provided for, might be recovered by summary proceeding, upon complaint before two or more justices: it was held, that this did not bar the party entitled from his remedy by action at law (*Collinson v. Ne. & D. R. Co.*, 1 Car. & K. 546; see also *Shepherd v. Hi.*, 25 L. J. Ex. 6; *Couch v. St.*, 18 Jur. 515). Where a statute gives a remedy by debt or case, either form of action may be sustained, though the effect of bringing case may be to deprive the defendant of a set-off to which he would have been entitled if the action had been in debt (*Miles v. Bo.*, 3 Q. B. R. 845; 7 Jur. 81; 12 L. J. Ex. 74). Where an act of Parliament directs a mode of procedure to be adopted contained in a former act, the repeal of such act does not operate to repeal the procedure directed, which is to be considered as incorporated in the latter act (*R. v. Stock*, 8 Ad. & El. 405).

There is a provision of the Pleading Rules of T. T., 1853, pl. 21, which may properly be noticed here—namely, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of an act of Parliament, he shall insert in the margin of the plea the words "by statute," together with the year or years of the reign in which the act or acts of Parliament



upon which he relies for that purpose were passed, and also the chapter and section of each of such acts, and shall specify whether such acts are public or otherwise, otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament; and such memorandum shall be inserted in the margin of the issue, and of the *Nisi Prius* record.

## C.

**CABINET.** The leading members of the executive government of the country constitute a board by themselves, apart from the general body of the Queen's ministers or Privy Council. The board so formed is called the "cabinet," and its meetings "cabinet councils." It is this body, and not the Privy Council at large, that is always understood when mention is made of the King's or (Queen's) "administration." Each of its members is usually invested with one of the principal offices of State, which are as follows: the Offices of the Lord President of the Council; of the First Lord of the Treasury; of the First Lord of the Admiralty; and of the principal Secretaries of State—viz., the Secretaries for Foreign Affairs, for the Colonies, for the Home Department, and for the War Department (2 St. C. 468, 4th ed.).

**CALENDAR OF PRISONERS.** A list of all the prisoners' names, with their several judgments in the margin, which is left with the respective sheriffs, as their warrant or authority; and if the sheriff receives afterwards no special order to the

contrary, he executes the judgments, of the law accordingly (4 Bl. C. 403t 404, and note by Chr.).

**CALLING THE PLAINTIFF.** It is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or to withdraw himself; whereupon the crier is ordered to *call the plaintiff*; and if neither he nor anybody for him appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The phrase is synonymous with nonsuiting the plaintiff (3 Bl. C. 376; 3 St. C. 624, 4th ed.; Com. L. Pract. 186, 211).

**CALLING TO THE BAR.** Conferring the dignity or degree of a barrister-at-law upon a member, being a student, of one of the inns of court is so termed. As a qualification for the call, the student must have kept commons for three years (*i. e.*, twelve terms), by dining in the hall of the society, into which he has obtained admission, at least three times in each term; and, by the present educational system, no student is eligible to be called to the bar who has not either attended during one whole year the lectures of two of the readers, or has satisfactorily passed a public examination. And accordingly, a public examination for all the inns collectively periodically takes place, extending to all students who are desirous of submitting themselves to that test of sufficiency. As an inducement to students to propose themselves for examination, studentships, tenable for three years, of fifty guineas a year, have been founded by the

inns of court, one of which is conferrable on the most distinguished student at each public examination.

**CALL OF THE HOUSE.** A call of the House, either in the Lords or Commons, is a course resorted to by Parliament, on the occurrence of business of more than ordinary importance; and it is competent to any member who may have a motion coming on upon a certain day, and is desirous of a full attendance, to give notice of his intention to move that the House be called over. If, on the day in question, any member do not attend in his place, he is sent for in custody of the Serjeant-at-Arms, and is liable to commitment and the consequent fines, unless he make some good excuse for his absence.

**CANAL AND NAVIGATION COMPANIES.** The liability of canal companies on the carriage of goods is the same (except as varied by any enactment of a special kind) with that of other carriers by land, as existing at common law, modified by the 1 W. 4, c. 68 (F. Bk. 197, 208, 209; 3 L. C. 94, 125). The 17 & 18 V. c. 31, has given jurisdiction to the Court of Common Pleas to inquire into, and, if necessary, restrain canal (and railway) companies from violating or controvening the provisions of the act directing such companies to make proper arrangements for receiving and forwarding traffic. They are liable for neglect or default, notwithstanding any notice attempting to limit their liability; but they may make reasonable conditions as to the receipt, forwarding, and delivery of the goods (1 L. C. 135; 2 St. C. 85, note).

**CANON LAW.** It consists partly of certain rules taken out of the scripture; partly of the writings of the ancient fathers of our church; partly of the ordinances of the general and provincial councils; and partly of the decrees of the popes in former ages. The canon law has no intrinsic force in England; but some portions have, in particular cases, and in some courts, been introduced and allowed, and so far they are binding (Com. Dig. tit. Canons, 1 St. C. 61, 4th ed.; F. Bk. 13).

**CANONRY.** An ecclesiastical benefice attaching to the office of *canon*. It is only capable of being held by a person in priest's orders, but no cure of souls belongs to it. A canon (except where the canonry is annexed to any professorship or office in the universities) must have been in complete priest's orders for six years previously to his appointment, and must be resident at least three months in the year. The right of appointing a regulated number of minor canons, with salaries, is now vested in the respective chapters, and honorary canons (without emolument) have been established in every cathedral church not having non-residentary prebends, &c., and these are in the gift of the archbishops and bishops respectively (3 & 4 W. 4. c. 113; 3 St. C. 17, 18, 4th ed.). A canonry is not the proper subject matter of ejectment (1 M. & G. 625).

**CANONS OF INHERITANCE.** The legal rules by which inheritances are regulated (2 Bl. C. 208; 1 St. C. 388, 4th ed.).

**CAPACITY.** The ability which a

man or body politic has to give or take lands or other things, or to bring actions (2 Bl. C. 290; Com. Dig. tit. "Capacity").

**CAP.** A writ used in the action of dower, and so called from the word *cape*, with which the writ commences. It is divided into *cape magnum* or *grand cape*, and *cape parvum* or *petit cape*. The writ of *grand cape* directs the sheriff to take into his possession a third of the lands in which dower is claimed, for the tenant's default in not appearing to the action, and then to summon the tenant to appear in court at Westminster to account for his prior non-appearances. The distinction between *grand* and *petit capes* is this: that the former never lies after an appearance by the tenant in chief, while the latter issues after the tenant has appeared, and makes default in any term subsequent to his appearance (1 *Rop. Husb. and Wife*, 431, 433; *Rosc. R. A.* 282; 3 *St. C.* 672, and *n.* 4th ed.).

**CAPIAS.** By the 2 W. 4, c. 39 (called the Uniformity of Process Act), it was enacted, that in the commencement of all personal actions where the plaintiff intended to arrest the defendant and hold him to bail, it should be done by a writ of *capias*. This is a writ directed to the sheriff of the county wherein the defendant is supposed to be, commanding him to take the defendant and him safely keep until he shall have given bail, or made a deposit of the amount for which he was arrested, together with such further charges as the law prescribes, &c. The writ of *capias*, however, is now no longer used for commencing an action; for by the

1 & 2 V. c. 110, being the act for abolishing arrest for debt, it was enacted (s. 2) that all personal actions in her Majesty's superior courts of law at Westminster shall be commenced by writ of summons (*Com. L. P.* 57). This act, after reciting that the power of arrest is unnecessarily extensive and severe, enacts, that the plaintiff, previously to arresting the defendant upon a writ of *capias*, shall show, to the satisfaction of one of the judges, that he has good cause for making such an arrest, as by showing that, unless he is immediately apprehended, he will quit the kingdom, &c. (*ante*, p. 26); a writ of *capias*, therefore, is now only resorted to after the action has been actually commenced by a writ of summons (see *Com. L. Pract.* 79—90). The *capias* is, as above stated, directed to the sheriff of the county in which it is supposed the defendant is to be found; the proper christian and surnames of the plaintiff and defendant should be inserted in the writ, and they should correspond with those used in the affidavits. The defendant may be described by the initial of his Christian name—1. Where the action is on a written instrument so describing him (3 & 4 W. 4, c. 42, s. 12); 2. Where the proper name could not be discovered after due diligence used for that purpose (*R. G. H. T.*, 1853, pl. 82; *Com. L. Pract.* 80). The supposed place of the defendant's residence should be stated, though in the form of the writ, as given in statute, the word "of" is not inserted after the defendant's name. The writ must be tested on the day of its being issued, and should be sued out within the time limited by the judge's order, which provides that the plain-

tiff shall be at liberty, within a specified period (usually ten days), to issue one or more writ or writs of *capias* into one or more different county or counties as may be requisite (Com. L. Pract. 83). There must be a memorandum to the writ purporting that it is to be executed within one calendar month from the date thereof inclusively. There is added to this a warning to the defendant, that, having given bail on the arrest, he must put in special bail in due time, otherwise the plaintiff may proceed against the sheriff, or on the bail bond. Two indorsements are required—1. The amount of bail and particulars of the judge's order; 2. The name and address of the attorney, and, if issued by a town agent, then of the country attorney, suing out the writ, or, if done in person, then the particulars of the plaintiff's name and address. No indorsement is required of the debt and costs. It must be borne in mind, that so much of the 1 & 2 V. c. 110, as relates to the form of the writ of summons is superseded by the C. L. P. Act, 1852, which after providing that all personal actions shall be commenced by writ of summons, gives fresh forms of writs of summons.

**CAPIAS AD AUDIENDUM JUDICIUM.** In case a defendant be found guilty of a misdemeanor (the trial of which may, and usually does happen in his absence), a writ, so called, is awarded and issued, to bring him to receive his judgment (4 Bl. C. 375; 4 St. C. 505, 4th ed.).

**CAPIAS AD RESPONDENDUM.** A writ formerly in use, where an original was sued out, &c., to take the

defendant, and make him answer the plaintiff (3 Bl. C. 281). The *capias* issued for the purpose of arresting a defendant pursuant to a judge's order, is also now commonly, though not very properly, called a *capias ad respondendum*: it is useful to distinguish it from a *capias* by way of execution.

**CAPIAS AD SATISFACIENDUM**, frequently called shortly a *ca. sa.* A writ of execution which a party to an action takes out after having recovered judgment against his opponent; it is directed to the sheriff, and commands him to take the party against whom the judgment is given, and safely keep him in order that he may have his body at Westminster on a day mentioned in the writ to make the party who recovered satisfaction for his demand (3 Bl. C. 415; Com. L. Pract. 249—254). No *ca. sa.* can issue where the sum recovered does not exceed £20, exclusive of the costs (7 & 8 V. c. 96, s. 57; 3 L. C. 403; 4 L. C. 419; Com. L. Pract. 249, 250). A *ca. sa.* may be issued on decrees, orders, and rules of courts of law, equity, and bankruptcy (1 & 2 V. c. 110, s. 20; Com. L. Pract. 221).

**CAPIAS ON INDICTMENT.** In general, the process on an indictment is by writ of *capias* where the person charged is not in custody, and in cases not otherwise provided for by statute. In the case of misdemeanors, a bench warrant is usually issued, and by the 11 & 12 V. c. 42, s. 3, instead of suing out a writ of *capias* a justice's warrant may be obtained (*ante*, p. 52; 4 St. C. 447, 448, 4th ed.).

**CAPIAS UTLAGATUM.** A writ that is used for the purpose of arresting a man who has been outlawed; it is directed to the sheriff, and commands him to apprehend the person outlawed for not appearing, and to keep him in safe custody in order that he may be presented before the court to be dealt with according to law. This writ formerly issued on process of outlawry for non-appearance to civil process, but now in civil cases outlawry is confined to proceedings *after* judgment, and is very rarely used.

**CAPITA.** In the distribution of the personal estate of a person dying intestate, the claimants, or the persons who by law are entitled to such personal estate, are said to take per capita when they claim in their own right as in equal degree of kindred, in contradistinction to claiming by right of representation, or per stirpes, as it is termed. As if the next-of-kin be the intestate's three brothers, A. B. and C.; here his effects are divided into three equal portions, and distributed per capita, one to each; but if A. (one of these brothers) had been dead, and had left three children, and B. (another of these brothers) had been dead, and had left two, then the distribution would have been by representation, or per stirpes, as it is termed, and one-third of the property would have gone to A.'s three children, another third to B.'s two children, and the remaining third to C., the surviving brother (2 Bl. C. 517; 2 St. C. 222, 4th ed.). The distribution per capita was introduced by the Statute of Distributions, for at the common law the only rule of succession was per stirpes (1 St. C. 403; 2 Id. 221).

The question distribution per stirpes or per capita sometimes arises where there is no intestacy, but a gift by will. In regard to the question of distribution per stirpes, or per capita, among children or other descendants of the *same* degree, Mr. Jarman has thus stated the rule in his Treatise on Wills, vol. 2, p. 3, "Where a gift is to the children of several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., they take per capita, and not per stirpes. The same rule applies where a devise or bequest is made to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation, as 'to my brother A., and the children of my brother B.,' in which case A. takes only a share equal to that of one of the children of B., though it may be conjectured that the testator had a distribution according to the statute in his view. And, of course, it is immaterial that the objects of gift are the testator's own children and grandchildren; as, where a legacy was bequeathed equally between my son David, and the children of my son Robert. But this mode of construction will yield to a very faint glimpse of a different intention in the context" (see *Dowling v. Sm.*, 8 Be. 541; *Tomlin v. Ha.*, 12 Sim. 167). Wherever the devise or bequest comprises issue of several degrees, it should be distinctly shown whether the objects are to take per capita or per stirpes. The different effects of these respective modes of distribution may be exhibited by the following supposed case:—Gift to the issue or descendants of A. A. dies, leaving an only sur-

viving child, who has no child, but A. has left three grandchildren, the children of a deceased child; a distribution per stirpes would occasion a division of the property into moieties, of which one would go to the surviving child, and the other to the three grandchildren. A distribution per capita would cause a division into four shares, of which the surviving child would take one, and the three grandchildren respectively the remaining three. Where the gift is to issue, or descendants simpliciter, it seems that the latter construction prevails, and that all the objects take as joint tenants (*Davenport v. Ha.*, 3 Ves. 257), unless the bequest contains words of severance or other expressions, importing division or equality, which would make the legatees tenants in common, but would not further alter the construction (*Butler v. St.*, 3 B. C. C. 367; *Crosley v. Cl.*, 3 Swanst. 320, n., incorrectly imported in *Amb.* 397). On the same principle it is clear that if a testator, having living children, and also grandchildren the children of a deceased son, makes a gift in favour of his children A. and B., and the children of his late son C., the distribution will be per capita, and not per stirpes; for though there may be plausible ground to conjecture that the testator intended the children of the deceased son to represent their deceased parent only, yet this, in the words of Lord Chancellor King, would be "to go too much out of the will" (*Blackler v. We.*, 2 P. W. 383; 11 Jarm. Convey. 316, 317, by Sw.).

**CAPITAL PUNISHMENT.** The punishment of death is frequently

termed capital punishment; and those offences are called capital offences, for which death is the penalty allotted by law. The use of the term may probably have arisen from the decapitation which in former times was a common mode of executing the sentence of death, and which is prescribed in some of the statutes against traitors even now remaining in force. The extreme sentence of the law, however, has for many years been carried into effect against all offenders by hanging them by the neck. The offences which are still capital offences have, by modern legislation, been recently much diminished, and now only include high treason, murder, unnatural offences, setting fire to any royal ship or stores, the causing or attempting injury dangerous to life with intent to commit murder, burglary accompanied with an attempt at murder, robbery accompanied with stabbing or wounding, setting fire to a dwelling-house, any person being therein, setting fire to or otherwise destroying ships with intent to murder any person, exhibiting false lights with intent to bring ships into danger, and piracy, accompanied by stabbing.

**CAPITE.** All tenures were either derived or supposed to be derived from the King as lord paramount; such as were held immediately under him in right of his Crown and dignity were called his tenants in capite or in chief; and the tenure by which they held was called tenure in capite (2 Bl. C. 59, 60; 1 St. C. 186, 4th ed.).

**CAPTION.** This word has several significations. When used with

reference to an indictment it signifies the style or preamble or commencement of the indictment (see below); as used in reference to a commission it signifies the certificate to which the commissioners' names are subscribed, declaring when and where it was executed. The act of arresting a man is also termed a caption (*Burn's Just. tit. Indictment*; *Dick. Sess. 53, 4th ed.*).

**CAPTION OF INDICTMENT.** The caption is no part of the indictment; it is merely the style of the court where the indictment was preferred, which is prefixed as a kind of preamble to the indictment upon the record when the record is made up, or when it is returned to a certiorari. The following is a form of the caption to an indictment in a court of quarter sessions. "Westmoreland. At the general quarter sessions of the peace holden at Appleby, in and for the county aforesaid, the — day of —, in the — year of the reign of our Sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, before A. B. and C. D., Esquires, and other their associates, justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors, in the said county committed, by the oath of" [the grand jurors, naming them] "good and lawful men of the county aforesaid, sworn and charged to inquire for our said Lady the Queen, and for the body of the county aforesaid, it is presented," that J. S. late of Appleby, in the county afore-

said, labourer, &c. (*Archb. Cr. Pl. & Ev. 25, 8th ed.*).

**CAPTURE.** In general, an arrest or seizure; but the term is applied more particularly to prizes taken by privateers in time of war, which are divided between the captors (2 St. C. 17, 18, 4th ed.). The subject of acquiring property in things personal by capture from the enemy is in general foreign to the province of the ordinary courts of law, and belongs to the jurisdiction of the prize court sitting under a particular commission from the Crown (3 Bl. C. 108; 2 St. C. 18, 4th ed.; 3 Chit. Com. L. 608—618).

**CARRIAGES, STAGE.** A "stage carriage" (not including metropolitan carriages, cabs and hackney coaches) is a carriage drawn by animal power, and used for the purposes of conveying passengers for hire to and from any place in Great Britain, travelling at the rate of three miles per hour, and charging separate fares (see 2 & 3 W. 4, c. 120, s. 5). Each carriage requires a yearly license, and certain particulars are required to be affixed and painted thereon. Numerous penalties are imposed on the owners, drivers, &c., of these carriages for offences, or neglects, militating against the safety or convenience of passengers, &c. (see *Oke's Mag. Syn. 572—578, 6th ed.*; 3 St. C. 275—277, 4th ed.). By the 2 & 3 W. 4, c. 120, if it shall happen that the driver, conductor, or guard of any stage carriage, shall have committed any offence against that act, but is not known, or, being known, cannot be found, the proprietor shall be liable to the same penalty as if he had been driver when the offence

was committed, unless he can prove by any other evidence besides his own testimony, and to the satisfaction of the justice of the peace before whom the complaint was heard, that the offence was committed without his privity or knowledge, and that he has derived no benefit therefrom, and that he has used his endeavours to find out such driver, conductor, or guard, and given all reasonable information in answer to inquiries respecting him.

**CARRIER.** A common carrier is one who undertakes to transport from place to place for hire the goods of such persons as think fit to employ him. Such is a proprietor of waggons, barges, lighters, merchant ships, or other instruments for the public conveyance of goods (1 Smith's L. C. in notes to *Coggs v. Bernard*, 101). A person who conveys passengers only is not a common carrier (*Aston v. Be.*, 2 Esp. 533; *Christie v. Gr.*, 2 Camp. 79; see as to the definition, *Bennett v. Pe. S. B. Co.*, 6 C. B. 787). A carrier must take the goods of any party, ready to pay the carriage, if there be room. He is, at common law, answerable for every loss or injury to the goods conveyed, unless occasioned by the act of God or the Sovereign's enemies (*Co. Litt.* 89). A carrier might, by the common law, by a public notice, limit the measure of his responsibility (*Com. L. Princ.* 308, 337—339; *Wyld v. P.*, 8 M. & W. 461; 2 St. C. 83, 84, 4th ed.; *F. Bk.* 197, 208, 209; 3 L. C. 387, 400; 1 L. C. 93), and the law is still so as to carriers, except where altered by statute. Thus as to carriers by *land*, by 11 G. 4, and 1 W. 4, c. 68, no public

notice shall limit or in anywise affect the liability of such carriers at common law, for any goods in respect whereof they may not be entitled to the benefit of that act; and that, on the other hand, no such carrier shall be liable for loss or injury to certain enumerated articles of a kind to lie in small compass (see 1 L. C. 93), when the aggregate shall exceed £10, unless at the time of delivery to the carrier the value and nature shall have been declared, and such increased charge paid thereon, as by a legible notice affixed in the office, shall have been previously advertised to the public; but if no such notice shall have been affixed, or if the carrier shall refuse (when required) to give a receipt acknowledging the parcel to be insured, he shall not be entitled to the benefit of the act, but shall remain liable as at common law, the whole being subject, however, to a proviso, that nothing in the act contained shall affect any express special contract between the carrier and customer, or protect the carrier, in any case, from loss arising from the felonious acts of any servant in his employ, or protect any such servant from liability for loss occasioned by his own personal neglect or misconduct (5 L. C. 24, 85, 86; *Metcalfe v. Lo. and B. R. Co.*, 31 L. T. 165; 6 W. R. 580; *Great West. R. Co. v. Ri.*, 27 L. J. C. P. 201; see further *Com. L. Princ.* 337—339). The following is an enumeration of the articles above referred to in the statute—namely, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of



any description, trinkets (7 W. R. 396), bills, notes of the Governor and Co. of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them. A carrier is not estopped from disputing the title of the person from whom he has received goods to carry: a delivery to the real owner will be an answer to an action by the bailor (*Sheridan v. Ne. Q. Co.*, 28 L. J. C. P. 58; 6 L. C. 62). A carrier is only bound to carry in a reasonable time under ordinary circumstances: he is not bound to make additional exertions to surmount obstructions caused by the act of God (*Briddon v. Gr. N. R. Co.*, 28 L. J. Ex. 51; 6 L. C. 62). As to carriers by sea, the liability usually depends on the bill of lading or charter-party (*ante*, p. 56), which ordinarily, except the act of God, and, in the case of a bill of lading, all perils of the sea (2 St. C. 86, 4th ed.). By the 17 & 18 V. c. 104, ss. 503, 504, no owner of any sea-going ship or of any share therein shall be answerable for loss or damage to goods on board, where it occurs without his actual fault or privity, beyond the value of his ship and freight during the voyage; and every owner is, moreover, entirely protected from loss or damages so occurring of or to any goods by reason of fire on board, or of or to

any gold, silver, diamonds, watches, jewels, or precious stones, by reason of robbery or embezzlement, unless the true nature and value of such articles have been inserted in the bill of lading, or otherwise declared in writing to the master or owner (see 17 & 18 V. c. 120; 18 & 19 V. c. 91; *African S. C. v. S.*, 25 L. J. Ch. 870; 1 L. C. 346; 3 Id. 323; 2 L. C. 121).

**CASE, ACTION UPON.** That form of action which is adopted for the purpose of recovering damages for some injury resulting to a party from the wrongful act of another. It is called an action upon the case (*super casum*), because the original writ by which the action was formerly commenced was not conceived in any fixed form, but was framed and adapted to the nature and circumstances of the particular case. The injuries to which it is most usually applied as the remedy are such as result from acts not immediately injurious, but only by consequence, or collaterally, or from negligence or carelessness, as distinguished from those which are in themselves immediate injuries to a person or his property, or are committed with design, and which usually form the subject of an action of trespass (see *Com. Dig. tit. Action upon the Case (A)*; 1 Ch. Pl. 127, 133, 6th ed.; 3 St. C. 450, 4th ed.; *F. Bk. 239*; *Com. L. Princ. 313—353*).

**CASES, SPECIAL (COMMON LAW).** The 3 & 4 W. 4, c. 25, had provided for the statement of a special case at law *after issue* joined, but now by the C. L. P. Act, 1852, s. 46, the parties may, *after writ issued*, and before

judgment, by consent and order of a judge, state any question or questions of law in a special case for the opinion of the court, without any pleadings. The statute only enables the parties to state such questions without pleadings which they might have raised with pleadings, but does not entitle them to put questions upon speculation (*Wellealey v. Wi.*, 4 El. & Bl. 750). By sec. 47 of the act, the parties may, if they think fit, enter into an agreement in writing (which is not subject to any stamp duty), to be embodied in the aforesaid or any subsequent order, that upon the judgment of the court being given in the affirmative or negative of the question or questions of law raised by such special case, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, shall be paid by one of such parties to the other of them, either with or without costs of the action. And (s. 48) in case no agreement shall be entered into as to the costs of such action, the costs follow the event, and are recovered by the successful party (*Ellicott v. Bi.*, 1 Jur. N. S. 49; 1 L. C. 313; 24 L. T. 203). By sec. 47 of the act, the judgment of the court may be entered for such sum as shall be so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed by proceedings in error. So, if the court give judgment for the defendant, the costs may be recovered in like manner. And by sec. 32, error may be brought on a special case unless the parties agree to the contrary. The Court of Error is either to

affirm the judgment or give the same judgment as ought to have been given in the court in which it was originally decided (see *Hughes v. Lu.*, 4 W. R. 115; 1 L. C. 313; *Ellicott v. Bi.*, 10 Ex. R. 927). It sometimes happens that, on the trial of a cause, the parties agree to take a general verdict subject to a special case, setting out the disputed point of law; in such cases, a special case is afterwards drawn up, and argued before the court (*Will. Pl.* 168, 169; 3 St. C. 625, 4th ed.). In the case of an action of ejectment, it is provided by the C. L. P. Act, 1852, s. 179, that, by consent of the parties, and by leave of a judge, a special case may be stated according to the practice theretofore used. This practice was regulated by the 3 & 4 W. 4, c. 42, s. 25 (above alluded to), by which the parties in any action, after issue joined, might, by consent and by order of any of the judges of the superior courts, state the facts of the case in the form of a special case for the opinion of the court, and agree that a judgment should be entered for the plaintiff or defendant, by confession or nolle prosequi, immediately after the decision of the case, or otherwise, as the court may think fit. A summons should be taken out by one of the parties "to show cause why a special case should not be stated herein;" a consent should be indorsed on the other side, and the points shortly stated before a judge, who will, in a proper case, make an order accordingly.

CASES, SPECIAL (EQUITY). Formerly courts of equity were in the habit of sending cases to courts of law for their opinion, but the 15 &

16 V. c. 86, s. 61, has abolished this practice, and provided that the courts of equity shall have full power to determine any questions of law which it may be necessary to determine previously to the decision of the equitable question at issue between the parties. Provision has, however, been made by the 13 & 14 V. c. 35, with a view to diminishing delay and expense, enabling persons interested in any question cognisable in the Court of Chancery (other than questions in bankruptcy, which constitutes a distinct and peculiar subject of jurisdiction), if they can concur in stating such question in the form of a special case for the opinion of the court, to file such special case accordingly, subject to certain provisions for the protection of lunatics, married women, and infants, when they are included as concurring parties, and such special case having been set down for hearing, the court is authorised to determine the question, and by decree to declare its opinion thereon without proceeding to administer any relief; and the declaration shall be as binding as it would have been if it had been contained in a decree made in a suit between the same parties, instituted by bill, and all executors, administrators, or trustees, making any payment, or doing any act in conformity with the declaration, shall be protected as they would have been by the express order of the court made in such suit. Where all persons beneficially interested are parties to a special case, the trustees ought to be omitted (1 L. C. 416). A special case may, in a proper case, be set down as a short cause (3 L. C. 185).

CASES, SPECIAL (CRIMINAL LAW). There are two occasions on which special cases may, in criminal matters, be stated—namely (taking them in chronological order), 1. Where at the trial a question of importance is reserved for the consideration of what is usually termed the Court of Criminal Appeal; 2. Where an appeal is made against the conviction or order of a magistrate to one of the superior courts, on the ground that such conviction or order is erroneous in point of law. The statute giving the right to a case to the Court of Criminal Appeal is the 11 & 12 V. c. 78, which, after reciting that it was expedient to provide a better mode than that then in use for deciding any difficult question of law arising in criminal trials in any court of oyer and terminer and gaol delivery, enacts, that when any person shall have been convicted of any treason, felony, or misdemeanor before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner, or justices of the peace before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the Exchequer; and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison, or shall take a recognisance of bail, with one or two sufficient sureties, and in such sum as the court shall

think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be. Where, after conviction by a jury at an assizes, questions of law have been reserved for the Court of Criminal Appeal, the prisoner will not be admitted to bail, although great delay may have taken place in the proceedings, without the assent of the judge before whom he was tried (Reg. v. Ha., 4 Cox's C. C. 21, Erle). By sec. 2, the judge or commissioner or court of quarter sessions shall thereupon state, in a case signed in the usual manner, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons; and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such

judgment and order, if any, of the said justices and barons, shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next court of oyer and terminer and gaol delivery or sessions of the peace shall vacate the recognisance of bail, if any; and if the court of oyer and terminer and gaol delivery or court of quarter sessions shall be directed to give judgment, the said court shall proceed to give judgment at the next session. By sec. 3, the jurisdiction and authorities by this act given to the said justices of either bench, and Barons of the Exchequer,

shall and may be exercised by the said justices and barons, or five of them at the least, of whom the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the Exchequer Chamber or other convenient place; and the judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior courts of common law at Westminster or Dublin, as the case may be, are now delivered. The Court is usually styled the Court of Criminal Appeal. By sec. 4, the case or certificate may be sent back for amendment. By sec. 5, where judgment is reversed on writ of error, the record may be remitted to court below for judgment. The decisions of the Court of Criminal Appeal are final, and no writ of error lies upon its judgment (*R. v. Faderman*, 4 Cox's C. C. 359; 1 Den. C. C. R. 565). The court has no authority to deal with judgments on demurrer (*Ib.*). But it has power to deal with objections taken in arrest of judgment (*Reg. v. Martin*, 3 Cox's C. C. 447; 1 Den. C. C. R. 398; 18 L. J. M. C. 137; 13 Jur. 368). And also, if an indictment be bad, the court under this statute will quash it, although no question is reserved thereon (*R. v. Webb*, 2 Car. & Kir. 933). Where the prisoners have not been tried and convicted, this court has not authority to hear, nor has the judge below power to reserve

a case upon the validity of an indictment, upon which he has already given judgment, even though the judgment should have been given expressly with a view to reserving the case. Under such circumstances the proper course for the prisoner is to bring a writ of error before the Queen's Bench. Where judgment is so given against a prisoner, this court has no power to place him in the same situation as he was before the demurrer. But where, by arrangement, no judgment is at the trial given upon the demurrer, the case goes on, and the prisoner is convicted, it would seem that the point raised upon demurrer may in such case be reserved. (See, however, *Reg. Gen.*, June 2, 1850; and 3 Law Digest, 1123; *Reg. v. Faderman*, 1 Den. C. C. R. 565; 4 Cox's C. C. 359). Where, at the trial a prisoner pleaded guilty to an indictment for larceny, setting forth a previous conviction, and the judge, feeling some doubt as to his power to pass sentence of transportation, reserved the case for the consideration of this court: it was held, on case reserved in Ireland, that no question having arisen on the trial, and because the Crown, or the prisoner, could bring a writ of error if a wrong sentence was pronounced, the Court of Criminal Appeal had no jurisdiction to entertain it (*Reg. v. Byrne*, 4 Cox's C. C. 248). Where an objection that the learned judge, at the trial, did not leave a certain question to the jury, has not been reserved, the court will not send the case back to be amended in order to raise the point; it will not consider an objection which has not been reserved, even though it should be fairly deducible from the case

itself, nor go into any matter of evidence which occurred at the trial if it is not stated in the case. Before the case is submitted to the court, if the written case reserved does not in the opinion of the counsel who were in the case below, fairly raise all the points that were in issue, the proper course is to apply to the judge reserving it to amend it before the case is submitted to the Court of Criminal Appeal (*R. v. Smith*, 1 Den. C. C. R. 510; 4 Cox's C. C. 42). This court will hear counsel for the Crown, though no counsel for the prisoner appear (*R. v. Martin*, 3 Law Dig. 770). Upon the question of the costs of proceedings under this statute it has been held, that the court which has been directed to pass sentence on a prisoner, after a point reserved for the decision of the Court of Criminal Appeal, has power to allow the costs incurred in the latter court, and upon taxation, under an order to that effect, the briefs and fees of two counsel will be allowed (*R. v. Woolley*, 4 Cox's C. C. 452). There is no taxing officer of the Criminal Appeal Court; therefore, where the judge at the trial allowed costs in the usual way, which the court above thought sufficient to include costs subsequently incurred in such court, the court directed its officer to ascertain the costs, and certify the same to the taxing officer of the court below: a rule is to be made on the subject (*R. v. Cutting*, 6 W. R. 41; 4 L. C. 238).

The following general order regulating the course of practice to be adopted in the Court of Criminal Appeal was made by all the judges:—It is ordered, that when any case

shall be transmitted by the court of oyer and terminer, or gaol delivery, or court of quarter sessions, for the consideration of this court, the original case, signed by the judge, or commissioner, or chairman of sessions, reserving the question of law, and seventeen copies of such case, one for each judge, and one for each party, shall be delivered to the clerk of this court, at the Exchequer Chamber, Westminster, at least four days before the day appointed for the sitting of the said court. That every case transmitted for the consideration of this court briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted: if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment, or the particular count. That no case be heard upon any demurrer to the pleadings. That every case state whether judgment on the conviction was passed, or postponed, or the execution of the judgment respited, and whether the person convicted be in prison, or has been discharged on recognisance on bail to appear and receive judgment, or to render himself in execution. That when any case is intended to be argued by counsel, or by the parties, notice thereof be given to the clerk of this court, at least two days previously to the sitting of the said court. That with every case delivered to the judges of this court (except such cases as shall be reserved by such judges) the fee payable to the clerks of the said judges shall not exceed the fee payable on "demurrer and other paper books," as contained in the table of fees allowed and sanctioned by the

judges, pursuant to the statute of 1 V. c. 30 (Reg. Gen., June 1, 1850; 4 Cox's C. C. App. p. xi). Recorders of borough quarter sessions are included by this act, and may reserve cases for the consideration of the judges (R. v. Masters, 2 Car. & Kir. 988; 12 Jur. 942; 12 L. J. Q. B. 154). Cases for the consideration of the judges, under 11 & 12 V. c. 78, are not to be lengthy narratives of the facts (R. v. Steer, 18 L. J. M. C. 30; 13 Jur. 41).

It now remains to notice the second of the occasions on which special cases in criminal matters may be stated—viz., where an appeal is made against the conviction or order of a magistrate. The statute giving this appeal is more recent in date than that above noticed, being the 20 & 21 V. c. 43, before mentioning the provisions of which it may be observed, that it was formerly a rule, that no appeal lay from a magistrate's decision unless it was expressly given by statute. The consequence was, that in very many cases no right of appeal existed, although the adjudication might have been as important in its nature and its results as in other instances from which the party dissatisfied had the power of appealing to the court of quarter sessions (see 27 L. J. M. C. 46; Oke's Syn. 206, note, 6th ed.). This anomaly was not remedied by Jervis's Act (the 11 & 12 V. c. 43), although it professed to consolidate and render uniform the procedure which relates to summary convictions and orders; but the 20 & 21 V. c. 43, furnishes a remedy by allowing an appeal against any conviction or order of magistrates (including orders as to lunatics, revenue cases, orders in

bastardy and factory cases, and also many other matters in special and petty sessions, Oke's Mag. Syn. 207, note, 6th ed.; see also, 32 L. T. R. 283; 6 L. C. 125), to *one of the superior courts of common law*, upon the ground that it is erroneous in point of law (4 L. C. 142—144). The magistrates, it is true, may refuse to allow the appeal (except where the application is made under the Attorney-General's direction), if they are of opinion that the application is merely frivolous; but even then the appellant may apply to the Court of Queen's Bench for a rule calling upon them to show cause why the appeal should not lie. The power to require a case to be stated is given to *either* party, so that it is equally open to an informant or complainant, whose information or complaint is dismissed, to require a case, as to a defendant who is convicted, or has an order made on him (6 L. C. 125; Potter v. Be., 21 J. P. 756). The form of the appeal is by special case, which is stated and signed by the justices, provided the application for that purpose is made to them in writing, and security to prosecute, &c., given within three days from their decision. The appellant on receiving the case must give a copy thereof, and notice of appeal, to the respondent, and transmit the case itself (without certiorari) to the superior court within three days after he, the appellant, has received it. The superior court, or a judge at chambers, decides the case, having power over the costs, and their decision is enforced by the magistrates. The statute does not provide for appeals on matters of *fact*: these, therefore, remain almost as before, and will lie

only where expressly allowed by statute, and then to the quarter sessions. The only alteration made as to such appeals is, that they will be taken to have been abandoned when an appeal on a point of law is made under this statute. The following is the provision contained in the second section of the statute—namely, that after the hearing and determination by a justice or justices of the peace (which, by sec. 12, includes a magistrate of the police courts of the metropolis, and any stipendiary magistrate), of any information or complaint which he or they have power to determine in a summary way by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the determination as being erroneous in point of law, apply in writing within *three* days (including Sunday, 4 L. C. xlvii; 6 W. R. 517) after the same to the said justice or justices to state and sign a *case* setting forth the facts and the grounds of such determination, for the opinion thereon of *one* of the superior courts of law, to be named by the party applying; and such party, called “the appellant,” shall, within three days after receiving such case, transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, called “the respondent.” By sec. 3, “the appellant, at the time of making such application, and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a

recognisance before such justice or justices, or any one or more of them, or any other justice exercising the same jurisdiction with or without surety or sureties, and in such sum as to the said justice or justices shall seem meet, conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior court, and pay such costs as may be awarded by the same.” By sec. 4, if the justice or justices shall be of opinion that the application is merely frivolous, but not otherwise, he or they may refuse to state a case, and shall, on request of the appellant, sign and deliver to him a certificate of such refusal, provided that they are not to refuse where the application is made to them by or under the direction of the Attorney-General. The 5th section empowers the Court of Queen’s Bench, when the justices refuse to state a case, to grant a rule (upon the application upon affidavit of the appellant) calling upon them and the respondent to show cause why such case should not be stated; and upon the rule being made absolute they are to state it accordingly. Sec. 6 confers power upon the superior courts to deal with the case when brought up; and it enacts that “the court to which a case is transmitted under this act shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices with the opinion of the court thereon, or may make such other order in relation to the matter, and may make such order as to costs as to the court may seem



fit; and all such orders shall be final and conclusive on all parties. Provided always, that no justice or justices of the peace who shall state and deliver a case in pursuance of this act shall be liable to any costs in respect or by reason of such appeal against his or their determination." The rule established as to costs, to be paid by the parties to the case (not being the justices, 28 L. J. M. C. 33; 6 L. C. 97), is, that they follow the result, unless some peculiarity in a given case makes it just that the rule be not observed (*Reg. v. Henry*, 22 J. P. 68). The Crown pays or receives costs according to the order of the court (6 L. C. 97; 7 W. R. 206). By sec. 7, the case may be sent back for amendment (see *Oke*, p. 210, n.; 4 L. C. 307, 390). By sec. 8, the powers of the superior court may be exercised by a judge at chambers. By sec. 9, after the decision of the superior court, the justices may issue warrants to enforce the conviction or order which has been affirmed or amended by the superior court. The 10th section dispenses with the necessity of obtaining a writ of certiorari in order to remove into the court above the case stated by the justices. This is a great improvement upon the practice which obtains with reference to cases stated at the quarter sessions, with respect to which all the cumbrous machinery of a certiorari is brought into action. When a party entering into a recognisance has failed to comply with its conditions, by sec. 13, the justice is to certify in what respect the failure has been, and then to transmit the same to the clerk of the peace, &c., to be proceeded on in the same manner as forfeited recognisances at

quarter sessions. The 14th section enacts that any person who shall appeal under the provisions of this act against any determination of a justice or justices shall be taken to have abandoned any right which he otherwise might have had of appealing to the court of quarter sessions. The following are the rules made in pursuance of the provisions of the above statute in Michaelmas Term (Nov. 25), 1857:—"1st. It is ordered, that in cases of appeal to a superior court under the provisions of the statute 20 & 21 V. c. 43, the 15th and 16th Practice Rules of Hilary Term, 1853, so far as the same are applicable, shall be observed." "2nd. And in cases where the appeal is to be heard before a judge at chambers, the appellant shall obtain an appointment for such hearing, and shall forthwith give notice thereof to the respondent, and shall, four clear days before the day appointed for the hearing, deliver at the judge's chambers a copy of the appeal." The rules of 1853 referred to in the first rule above, are as follows:—  
15. No motion or rule for a concilium shall be required, but demurrers, as well as all special cases, special verdicts, and appeals from county courts, shall be set down for argument in the special paper, at the request of either party, four clear days before the day on which the same are to be argued, and notice thereof shall be given forthwith by such party to the opposite party."  
"16. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer-book, special case, special verdict, or appeal cases, with the points intended to be insisted on, to the

Lord Chief Justice of the Queen's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior puisne judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority; and in default thereof by either party, the other may on the day following deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the master a sufficient sum to pay for such copies. If the statement of the points have not been exchanged between the parties, each party shall, in addition to the two copies left by him, deliver also his statement of points to the other two judges, either by marking the same in the margin of the books delivered, or on separate papers."

**CASSETUR BREVE.** A judgment so termed, because it commands the plaintiff's writ to be quashed. An entry of a *cassetur breve* is usually made by the plaintiff in an action after the defendant has pleaded a plea in abatement which the plaintiff is unable to answer, and therefore wishes his informal writ to be quashed in order that he may sue out a better (see 3 Chit. Plead. 1063, 6th ed.; Will. Plead. 200, 203).

**CASUAL EJECTOR.** The nominal defendant Richard Roe, in an action of ejectment was so called, because by a legal fiction he was supposed casually or by accident to come upon the land or premises and turn out the lawful possessor; but the fiction has been abolished, and now the

writ of ejectment is directed to the person or persons in possession by name, and to all persons entitled to defend the possession of the property claimed (Com. L. Princ. 355; Com. L. Pract. 257).

**CAUSES OF ACTION, JOINDER OF.** Some important provisions are made by the C. L. P. Act, 1852, for the joinder of different causes of action, so as to prevent the necessity for bringing several actions; before mentioning which it may be observed, that even prior to the act, whenever there were two or more causes of action which might be sued upon in the same form of action, the plaintiff ought to have brought one action only for the whole; and if he brought several, he might have been compelled to consolidate them. The rule by which the joinder of actions was regulated may be stated thus:—That when the same plea might have been pleaded, and the same judgment given on all the counts contained in the plaintiff's *declaration*, or when the counts were of the same nature and the same judgment could have been given, though the pleas might be different, the causes of action might have been joined. It may, perhaps, hardly be necessary to observe, that in all cases where the causes of action were of the same nature, and were sued for in the same form of action, the plaintiff was even formerly at liberty to join as many as he had. It was also another rule (which is adhered to by the C. L. P. Act, 1852), that the plaintiff could sue in the same action for such causes only as had accrued to him, or against the defendant in the same right. A misjoinder of causes of action was ground of

demurrer, arrest of judgment, or error. But it was clearly settled that a plaintiff could not join in one action causes of action requiring different forms of action. So far was this carried, that the courts (with the exceptions of debt and detinue, and case and trover, which were really not distinct in their natures) held, that counts in one form of action could not be joined with counts in another form of action, even though they were both on contracts, or both in tort; nor, of course, could a count in tort be joined with one on contract. Thus debt and trespass, or debt and account, could not be joined, nor could assumpsit and trover (Brown's Actions, 561; Bacon's Abr. tit. "Actions in General," C. pp. 58 *et seq.*, 7th ed.). But this is now altered, for by sec. 41 of the C. L. P. Act, 1852, causes of action, of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit; but this does not extend to replevin or ejectment. Where two or more of the causes of action so joined are local, and arise in different counties the venue may be laid in either of such counties; but the court or a judge at chambers may prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case the court or judge may order separate records to be made up, and separate trials to be had. It will be observed, that the causes of action (conformably with what we have seen was the old rule), in order to be joinable in one action, must be in the same right—that is to say, a plaintiff cannot, under the above provisions, join a cause of action

accruing to him in his own right with one accruing to him as assignee, or executor, or administrator, or the like; nor can a defendant be sued in one count in his own right, and in another as assignee, executor, or administrator, or the like (Bacon's Abr. *ut supra* and tit. "Executors," O.). In these cases, therefore, a demurrer for misjoinder of causes of action, which may be a general demurrer (F. Bk. 270), is still allowable. It will be seen, that no authority is given to the court or a judge to prevent different causes of action from being joined in the same declaration, but only to order separate trials to be had, if such a course is considered expedient. By sec. 40 of the C. L. P. Act, 1852, provision is made with respect to actions by husband and wife for an injury done to the wife, it being enacted, that in any action brought by a man and his wife, for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated if the court or a judge shall think fit: provided, that in the case of the death of either plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate.

CAVEAT. A proceeding used to prevent the proving of a will, or the granting of administration, or the institution of a parson. When a caveat is entered against proving a will, or granting administration, a suit usually follows to determine either the validity of the testament, or who has a right to administer.

This claim or obstruction by the adverse party is an injury to the party entitled, and as such is remedied by the sentence of the probate court, either by establishing the will or granting the administration (3 Bl. C. 98, 246; Horsey's Probate Act, 133, 184, 233, 234). With respect to the entry of a caveat in the Court of Probate, the following is a statement of the present practice:—Any party desirous of opposing the probate of a will may do so by means of a caveat, which, when entered in the registry, either principal or district, remains in force for six months and then expires, and is of no effect, but may be renewed from time to time. Such caveat entitles the party lodging it to have warning or notice from the registrar, through the post, of any application for probate which may be made during the six months. Within six days after such service an appearance must be entered by the party, or, in default, probate will be granted. Upon a caveat being entered in London, the registrar sends notice of it to the proper district registrar; and if it be lodged in the country, the district registrar sends notice to London, and to the registrar of any district alleged to be that of the deceased (Rules & Ord. of Probate Court; Horsey's Prob. 133, 184, 233, 2nd ed.).

**CAVEAT EMPTOR:** A maxim of law applicable to the sale of goods and chattels, under the authority of which a vendor is not bound to answer for the *goodness* of the wares he sells, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, and has used any art to disguise

them; and this is so although the price was such as is usually given for a sound commodity. An affirmation at the time of sale may be a *warranty*, if it appears to have been so intended (2 St. C. 75, 4th ed.; 1 Smith's L. C. 78). On a contract for the purchase of goods of any particular denomination, where the purchaser has no opportunity of inspecting them before they are delivered, there is an implied warranty on the part of the seller that they shall be of the quality saleable in the market, under the denomination in question (Gompertz v. Ba., 2 El. & Bl. 849). Whether there is an opportunity of inspection by the buyer or not, the seller of an ordinary commodity, manufactured in a particular instance by himself, and bought for a known and ordinary purpose, impliedly warrants, it is said, that it has no latent defect to make it unfit for that purpose (2 St. C. 75, 4th ed.; Dawson v. Co., 2 C. B., N. S., 14). But on the sale of an article used in a certain manufacture by a person not a manufacturer or original producer, and who sells it by sample, the purchaser carrying on a particular manufacture in which the article is used, it seems, that there is no implied warranty that the article is fit to be used in that manufacture, even although the sample was found to be so, and the only undertaking is that the sample was fairly taken from the bulk; but it is no defence in an action for the price, that a portion of the bulk turned out wholly unfit for the manufacture, for non constat that the bulk generally will be so, or that even if it is so, the sample was fairly taken (Sayers v. Lo. & B. F. G. & A. Co.,

27 L. J. Ex. 294). Where a person sells goods and chattels as his own, and the price being paid, the *title* proves deficient, the vendor will be liable to refund the money to the purchaser on the ground of failure in the consideration on which it was paid (3 Bl. C. 166; *Tims v. Ma.*, 17 Q. B. 281; *Morley v. At.*, 3 Ex. 500; *Bandy v. Ca.*, 8 Ex. 918).

**CEPI CORPUS.** When a writ against the body of a party is directed to the sheriff to execute, he is commanded to return the writ, together with the manner in which he has executed it; if the sheriff has taken the defendant, and has him in custody, he returns the writ, together with an indorsement on the back, stating that he has taken him, which is technically called a return of *cepi corpus* (3 Bl. C. 288).

**CERTIORARI.** A writ, issuing sometimes out of the superior common law courts, and sometimes out of Chancery. It issues, either in civil or criminal cases, to remove any matter or cause, with all the proceedings thereon, from some inferior court into the superior court, when it is surmised that a partial or insufficient trial will probably be had in the court below (4 Bl. C. 320; 3 St. C. 721; 4 Id. 453, 454, 4th ed.).

**CERTIORARI (at Common Law).** There are three instances in which a certiorari is necessary in the common law courts—viz., 1, to remove a record into court when nul tiel record is pleaded; 2, to remove a pending cause from an inferior court; 3, to remove a judgment to have execution. 1. Where the de-

fendant pleads a judgment recovered in another court, it is necessary to prove it by the production of a transcript or exemplification of the record, and this obtained by a writ of certiorari directed to the judge or officer having the custody of the record. If the court in which the record is be a superior court, the certiorari is sued out from the Petty Bag Office, directed to the chief of the court, returnable in Chancery, whereupon an exemplification or transcript of the record is written on parchment, and sealed with the seal of the Chancellor, and sent with a mittimus to the court in which the action is. If, however, the action is in the Queen's Bench, and the record is in the Common Pleas or Exchequer, a certiorari may also issue direct from the Queen's Bench in the first instance. If the record is in an inferior court the certiorari may be sued out either from the superior court in which the action is pending or out of the Petty Bag Office. It is sufficient to return the tenor of the record without certifying the record itself (*Hambledon v. La.*, 3 Salk. 296; see as to Petty Bag Office, 11 & 12 V. c. 94; 12 & 13 V. c. 109). 2. Causes which are in their nature removable may be removed from an inferior court of record into one of the superior courts, before judgment, by writ of certiorari. The case of a removal from the county courts is stated separately. The writ may issue at the instance either of the plaintiff or defendant in the action below (*Sanders v. Sh.*, 3 Dowl. 90), out of any one of the superior courts, and, with the exceptions hereafter specified, lies in all cases to remove any cause, even in ejectment, out of an inferior

court of record, whether the action were commenced by process against the person or not; but it must be issued before judgment (*R. v. Seton*, 7 T. R. 373), and delivered to the judge of the inferior court, before any of the jury are sworn in the cause; and in cases where such judge is a barrister of three years' standing, it must be so delivered before issue of fact or law joined therein, provided such joinder takes place within six weeks after appearance. If delivered after the time a procedendo will issue, although the record has been filed in the court above (*Laverack v. Be.*, 3 M. & W. 62; 21 Jac. 1, c. 23, s. 2). But it does not lie in any case, unless the debt or damages laid, or the value of the thing demanded in the court below, exceeds £5, if the steward or judge of such court be a barrister of three years' standing, unless the action concern the freehold, or inheritance, or title to lands, lease, or rents (21 Jac. 1, c. 23, ss. 3, 5, 6; see also 12 Geo. 1, c. 29, s. 3; *Frank v. Qu.*, 7 Dowl. 607). It does not lie where the action is maintainable in the inferior court only, as where the custom of a place makes a thing actionable there, which is not generally the cause of action (*Pope v. Va.*, 2 W. Bl. 1060; *Wilson v. Cl.*, Carth. 75). In case of a judgment by default, if the writ is not delivered until after the jury have assessed the damage on the writ of inquiry, the court will award a procedendo (*Smith v. St.*, 3 Dowl. 609). After removal the cause proceeds in the superior court from the stage at which it had arrived in the court below (*Doe v. Dr.*, 1 B. & C. 253). 3. With respect to the removal of causes

after judgment in inferior courts, for the purpose of issuing execution in a superior court, there are three statutes, the 19 G. 3, c. 70 (applying generally), the 1 & 2 V. c. 110, s. 22 (applying where the judge of the inferior court, not being a county court, is a barrister of seven years' standing), and the 4 & 5 W. 4, c. 62, s. 31, and 2 & 3 V. c. 16, s. 28 (applying to the Courts of Common Pleas at Lancaster and Durham. As to the general case, the 19 G. 3, c. 70, s. 4, enacts, that "where judgment is given in an inferior court of record, it shall be lawful for any of the superior courts of Westminster (upon affidavit of such judgment being obtained, and of diligent search and inquiry having been made after the person of the defendant, or his effects, and of execution having issued against his person or effects, as the case may be, and that his person or his effects are not to be found within the jurisdiction of the inferior court), to cause the record of the judgment to be removed into such superior court, and issue writs of execution thereon against the person or effects of the defendant, in the same manner as upon judgment in the said courts at Westminster." This statute applies only to cases in which the proceedings below are similar to those in the courts above. Judgment on proceedings in foreign attachment in the Lord Mayor's court cannot, therefore, be removed (*Bulmer v. Ma.*, 5 B. & Ald. 821). It does not apply, it appears, to the case where the judgment is for the defendant (*Batten v. Sq.*, 4 Dowl. 53), nor to any judgment in ejectment (*Doe d. v. Shipley*, 2 Dowl. 408). The amount for which the judgment has

been obtained, or of the original debt, is immaterial (*Knowles v. Ly.*, 2 Dowl. 623).

**CERTIORARI** (*Criminal Cases*).—In criminal cases, a certiorari issues out of the Court of Queen's Bench, either, 1. to remove a conviction or order of a justice of the peace, with a view to testing the legality of the proceedings; in some instances the certiorari is expressly taken away by statutes (see *Oke's Mag. Syn.* 39—42); or 2. to remove an indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction. In this last case, the certiorari is granted, 1. to consider and determine the validity of the indictment; 2. To have a trial at bar or at nisi prius; 3. to plead a royal pardon; 4. To issue outlawry. 5. Under the 19 & 20 V. c. 16, where, though the offence was committed out of the jurisdiction of the Central Criminal Court, a trial there is thought proper. The certiorari, upon delivery, supersedes the jurisdiction of the inferior court. It may be granted at the instance of either the prosecutor or the defendant; except in the case of the Attorney-General, leave must be obtained to issue the writ, and a recognisance with sureties must be entered into (5 & 6 W. & M. c. 11; 8 & 9 W. 3, c. 33; 16 & 17 V. c. 30, s. 35). And by the 16 & 17 V. c. 30, s. 4, no indictments, except against bodies corporate, incapable of appearing by attorney, shall be removed into the Queen's Bench or the Central Criminal Court by certiorari, except at the instance of the Attorney-General, unless it be shown that a *fair and impartial trial* cannot be had in the

court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial; or that a view of the premises in respect whereof the indictment is preferred, or a special jury may be required for the satisfactory trial of the same. Provision is made by the statute for the payment of the costs incurred subsequent to the removal, either by the defendant or by the prosecutor, according to the ultimate result.

**CERTIORARI** (*to County Courts*).—The county courts, like all inferior jurisdictions, are subject to the supervision of the superior courts by writs of certiorari and prohibition. It is almost always a defendant who applies for a writ of certiorari, and not a plaintiff, for the latter, by instituting proceedings in the county courts tacitly admits the propriety of the trial and adjudication of that court. By the 9 & 10 V. c. 95, it was enacted "that no plaint entered in any court holden under that act should be removed or removable from the said court into any of her Majesty's superior courts of record by any writ or process, unless the debt or damage claimed should exceed £5, and then only by leave of a judge of one of the said superior courts, in cases which should appear to the judge fit to be tried in one of the superior courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he should think fit." The power under this section is not affected by the 13 & 14 V. c. 61, s. 16, which enacts that no judgment, order, or determination given or

made by any judge of a county court, nor any cause or matter brought before him or pending in his court, shall be removed by appeal, motion, writ of error, certiorari, or otherwise, into any other court whatever, save and except in manner and according to the provisions thereinbefore mentioned with respect to appeal. As the County Court Commissioners observed, it occasionally happens that questions of great difficulty, both of law and fact, arise in cases where the amount in dispute does not exceed £5. They therefore recommended that, subject to certain provisions for security, a defendant might, by leave, remove the plaint, and accordingly, the 19 & 20 V. c. 108, s. 38, provides that "any action commenced in a county court for a claim not exceeding £5, may be removed by writ of certiorari into a superior court, if such superior court, or a judge of a superior court, shall deem it desirable that the cause shall be tried in such superior court, and if the party applying for such writ shall give security, to be approved by one of the masters of such superior court, for the amount of the costs and the costs of the trial, not exceeding in all £100, and shall find, by assent to such terms, if any, as the superior court or judge shall think fit to impose." By the 19 & 20 V. c. 108, s. 38, certain provisions are made to prevent the certiorari being had recourse to for purposes of vexation and oppression, it being enacted, that "the granting by any of the superior courts, or by any judge thereof, of a rule or summons to show cause why a writ of certiorari or prohibition should not issue

to a county court, shall, if the superior court or a judge thereof so direct, operate as a stay of proceedings in the cause to which the same shall relate, until the determination of such rule or summons, or until such superior court or judge shall otherwise order; and the judge of the county court shall from time to time adjourn the hearing of such cause to such day as he shall think fit, until such determination, or until such order be made; but if a copy of such rule or summons shall not be served by the party who obtained it on the opposite party, and on the registrar of the county court, two clear days before the day fixed for the hearing of the cause, the judge of the county court may, in his discretion, order the party who obtained the rule or summons to pay all the costs of the day, or so much thereof as he shall think fit, unless the superior court, or a judge thereof, shall have made some order respecting such costs. In several cases, also, parties by their mode of proceeding, when the writ of certiorari had been obtained, rendered it a medium of harassing their opponents. Thus, a defendant has waited until a plaintiff has incurred all the expenses of preparing for trial, and, when the cause was called on, has produced a writ of certiorari to remove the proceedings. The plaintiff, under such circumstances, had no remedy for his costs, as by the operation of the writ the parties had ceased to be suitors of the court. The 19 & 20 V. c. 108, s. 41, provides, that "where a writ of certiorari or prohibition, addressed to a judge of a county court, shall have been granted by a superior court or a judge



thereof, on *ex parte* application, and the party who obtained it shall not lodge it with the registrar, and give notice to the opposite party that it has issued, two clear days before the day fixed for hearing the cause to which it shall relate, the judge of the county court may, in his discretion, order the party who obtained the writ to pay all the costs of the day, or so much thereof as he shall think fit, unless the superior court or a judge thereof shall have made some order respecting such costs." Formerly, if one of the superior courts or a judge thereof refused a writ of certiorari, it was competent for the applicant to renew his application in either of the other two courts, and in the event of the second refusal, he might apply to the third court. This state of the law appeared to the County Court Commissioners to be inconvenient; and accordingly it is provided by the 19 & 20 V. c. 108, s. 44, that when any superior court or a judge thereof shall have refused to grant a writ of certiorari, or of prohibition, to be addressed to a judge, no other superior court or judge thereof shall grant such writ; but nothing herein shall effect the right of appealing from the decision of the judge of the superior court to the court itself, or prevent a second application being made for such writ to the same superior court or a judge thereof, on grounds different from those on which the first application was founded. The usual ground for applying for a certiorari is, that difficult questions of law are likely to arise upon the trial. Where the superior court would not originally have had jurisdiction, as to recover a legacy or partner-

ship accounts, the cause cannot be removed (*Longbottom v. Lo.*, 22 L. J. Ex. 74; *Rees v. Wi.*, 21 L. J. Ex. 24). The application for the certiorari is made to a judge at chambers, and not to the court (*Robertson v. Wo.*, 19 L. J. Ex. Q. B. 367), grounded on a proper affidavit of facts. Service of writ upon the clerk of the county court, or upon a person acting as clerk, at the office of the chief clerk, is good service on the judge, though, where the writ does not come to the judge's knowledge until after the return day, the proper course is to rule the judge to return the writ, and not to move for an attachment against him in the first instance, although an attachment will lie against the county court judge for disobeying a writ of certiorari (*Brookman v. We.*, 20 L. J. Q. B. 278; *Mungean v. Wh.*, 6 Ex. 88).

Any action of replevin brought in a county court may be removed into any superior court by certiorari, on the defendant giving security for not exceeding £150, conditioned to defend such action with effect, and if the action be tried, to prove that the defendant had good ground for believing, &c., that the title to some ~~land~~ <sup>premises</sup>, &c., was in question, and that the distress exceeded £20 (19 & 20 V. c. 108, s. 67).

A judgment obtained in a county court may be removed by certiorari into one of the superior courts in order to be enforced. This is by the 19 & 20 V. c. 108, s. 49, which enacts, that "if a judge of a superior court shall be satisfied that a party against whom judgment for an amount exceeding £20, exclusive of costs, has been obtained in a

county court, has no goods or chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of certiorari to issue to remove the judgment of the county court into one of the superior courts, and, when removed, it shall have the same force and effect, and the same proceedings may be had thereon as in the case of a judgment of such superior court, but no action shall be brought upon such judgment."

**CERTIFICATE, TRIAL BY.**—A trial now little in use, and is resorted to in cases where the fact in issue lies out of the cognisance of the court, and the judges, in order to determine the question, are obliged to rely on the solemn averment or information of persons in such a station as affords them the clearest and most competent knowledge of the truth. Thus, when a custom of the city of London is in issue in any other than the city courts, such custom is tried by the certificate of the mayor and aldermen, certified by the mouth (*ore tenus*) of their recorder (F. Bk. 8; 12 L. J. C. P. 261); so in the action of dower, when the tenant pleads in bar that the demandant was never *accoupled* to her alleged husband in lawful *matrimony*, and issue be joined upon this, the court awards that it be tried by the diocesan of the place where the parish church in which the marriage is alleged to have been had is situate, and that the result be certified to them by the ordinary at a given day (8 Bl. C. 333; Steph. on Pl. 112, 113; Co. Litt. 74).

**CERTIORARI BILL.**—A bill of

certiorari is exhibited in the Court of Chancery when a suit is commenced in an inferior court of equity, and the defendant to such suit is apprehensive that he cannot have complete justice by reason of the limited jurisdiction of that court or the court itself has no jurisdiction. The bill is so called after the special writ which it prays—i. e., the writ of certiorari, to remove the cause from the inferior court into the Court of Chancery. Should the court see fit to remove the cause from the inferior court within its own immediate jurisdiction, the bill which is filed in the latter court is considered as an original bill in Chancery (Pract. Eq. 86, 101). The proceeding is so rare, that it is not mentioned in many of the modern books of practice (see Grant's Pract. 61, 4th ed.).

**CESSIO BONORUM.** The yielding up or ceding of goods or property. The law of *cession*, introduced by the Christian emperors, provided, that if a debtor *ceded* or yielded up all his fortune to his creditors, he should be secured from being dragged to a gaol, "*omni quoque corporali cruciату se moto*" (2 Bl. C. 473; 2 St. C. 145, n. d., 4th ed.).

**CESSION OF BENEFICE.** There are several ways in which a parson may cease to be such, and among these is *cession*, or taking another benefice. The old statute upon this subject was the 21 Hen. 8, c. 13, which has been repealed by the 13 & 14 V. c. 98, which enacts, that in future (and subject to exception in the case of rights already vested), no spiritual person shall take and hold together any two benefices,

except in the case of two benefices the churches of which are within three miles of one another by the nearest road, and the annual value of one of which does not exceed £100: that no spiritual person holding a benefice with cure of souls, with a population of more than 3000, shall take to hold there with any other having a population of more than 500; nor, vice versa, that no spiritual person, holding more than one benefice with cure of souls, shall take to hold therewith any other, or any cathedral preferment; and that, upon every admission to a new benefice or preferment contrary to the acts, every benefice previously held shall be void *ipso facto*, which prohibitions, however, in respect of population and yearly value, are subject to a provision enabling the Archbishop of Canterbury to grant a dispensation therefrom in certain cases, on recommendation of the bishop of the diocese (see also 18 & 19 V. c. 127; 1 & 2 V. c. 106, ss. 2, 5, 6, 11). As to persons holding cathedral appointments, see 1 & 2 V. c. 106, s. 11; 4 & 5 V. c. 39; 13 & 14 V. c. 94, s. 19; 13 & 14 V. c. 98, ss. 5, 6).

**CESTUI QUE TRUST.** He for whose use or benefit another is invested or seised of lands or tenements; or in other words, he who is the real, substantial, and beneficial owner of lands which are held in trust (1 Cruise's Dig. 411; 1 St. C. 370, 375, 4th ed.).

**CESTUI QUE USE.** He for whose use lands or tenements are held by another (2 Bl. C. 328; 1 St. C. 858, 4th ed.).

**CESTUI QUE VIE.** He for whose life lands or tenements are granted. Thus, if A. grants lands to B. during the life of C., here C. is termed the *cestui que vie* (2 Bl. C. 183; 1 St. 259, 335, 336). By the 6 Anne,<sup>1</sup> 18, all persons on whose lives any estates are holden shall (upon application to the Court of Chancery, and order made thereupon), once in every year (if required), be produced to the court, or its commissioners, or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to the expectant estate may enter upon and hold the property till the party shall appear to be living (Re Isaac, 4 My. & C. 11). As to the case of the *cestui que vie* being abroad, see 6 Anne, c. 18, s. 2; 19 C. 2, c. 6, which last statute provides for the case of the *cestui que vie* concealing himself for seven years together.

**CHAFEWAX.** An officer in Chancery, who fitted the wax for the sealing of writs, and other instruments, but whose office, with his deputy, has been abolished by the 15 & 16 V. c. 87, s. 23).

**CHAIRMAN OF COMMITTEES.** At the commencement of every new Parliament, each of the two Houses respectively selects from its own body a member to preside over its proceedings whilst the House is in committee. The officer so appointed is called "The Chairman of Committees of the whole House," and exercises the same authority in a committee of the whole House as the Speaker does on ordinary occasions.

**CHALLENGE.**—An exception taken

against jurors, either one or more of them. There are two kinds of challenge; either to the *array*, by which is meant the whole jury as it stands arrayed in the panel, or little square pane of parchment on which the jurors' names are written; or to the *polls*, by which is meant the several particular persons or heads in the array. A challenge to the array is at once an exception to the whole panel in which the jury are arrayed; and it may be made upon account of partiality, or some default in the sheriff or his under officer, who arrayed the panel; as should the sheriff be a party in the suit, or related to either of the parties, or the panel arrayed at the nomination or under the direction of either the plaintiff or defendant in the cause, &c., this would be a good ground for a challenge to the array. *Challenges to the polls* are exceptions to particular jurors; and seem to answer the *recusatio iudicis* in the civil and canon laws. Challenges to the polls of the jury (who are judges of fact) are by Sir Edward Coke reduced to four heads: viz.—*propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum* (3 Bl. C. 359, 363; 3 St. C. 596—601, 4th ed.). It is to be observed, that the case of a formal challenge, whether to the array or the polls, has now become infrequent; for where the sheriff is not indifferent, the jury may be impanelled in the first instance by the coroner; and supposing it to be impanelled by the sheriff, this will be a sufficient ground, not only for challenge, but for moving in arrest of judgment after the verdict (Arch. Pr. by Chit. 8th ed. p. 422); so, in case of any objection to a particular

juror, the usual course now is simply to intimate the objection to the proper officer of the court, who, unless the matter be disputed on the other side, will refrain from calling him. So that the learning of challenges, in civil cases at least (though still of importance), is rarely illustrated by the modern practice of the courts.

**CHAMBERLAIN.**—A high officer of state. Various great officers are so called; as the Lord Great Chamberlain of England, Lord Chamberlain of the Household, Chamberlain of the Exchequer, &c. To the Lord Chamberlain the keys of Westminster Hall are delivered upon all solemn occasions. He disposes of the sword of state, to be carried before the Sovereign when coming to the Parliament, and goes on the right hand of the sword, next to the sovereign's person. He has the care of providing all things in the House of Lords in the time of Parliament. To him belongs livery and lodgings in the sovereign's court, &c., and the gentleman usher of the black rod, yeoman usher, &c., are under his authority. There are two officers of this name in the King's exchequer, who were wont to keep a controlment of the pells of receipt, and exits, and certain keys of the treasury and records; they kept also the keys of that treasury where the leagues of the King's predecessors and divers ancient books, as Domesday, Black Book of the Exchequer, remain (Cunn. Dict.).

**CHAMPERTY.**—That species of maintenance which consists in the purchasing an interest in the thing

in dispute, with the object of maintaining and taking part in the litigation (*Stanley v. Jo.*, 7 Bing. 378; *Stevens v. Ba.*, 15 Ves. 139; *Bell v. Sm.*, 5 B. & C. 188; 4 St. C. 304, 4th ed.). It is not necessarily champerty to buy an incumbrance which is the subject of a suit in equity (*Knight v. Bo.*, 6 W. R. 28): as to advances to enable a party to carry on a suit, see *Clark v. M'Na.*, 27 L. T. 45; 2 L. C. 367). The purchase of a suit by an attorney pendente lite is unlawful, but a security given to him on the property in contest is lawful: the distinction is between a sale out and out and a mere security (*Anderson v. Ra.*, 31 L. T. 213; 5 L. C. 23).

**CHAMPERTOR.**—He who is guilty of the offence of *champerty*. A bargainer, purchaser, or promoter of other persons' suits or actions at law (4 Bl. C. 135).

**CHANCELLOR.**—There are many officers bearing this title; those however which it will be necessary to mention here are, 1st. The *Lord Chancellor*; 2nd. the *Chancellor of the Duchy of Lancaster*; 3rd. the *Chancellor of a diocese*; 4th. the *Chancellor of the Exchequer*. The *Lord Chancellor* is the presiding judge in the Court of Chancery; he is created by the mere delivery of the great seal into his custody, whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior, if a baron, in point of precedence to every temporal lord. He is a privy councillor by his office, and prolocutor of the House of Lords by prescription. To him (under the

Crown) belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic (for none else were then capable of an office so conversant in writings) and presiding over the royal chapel, he became keeper of the sovereign's conscience, visitor, in right to the sovereign, of all hospitals and colleges of the king's foundation, and patron of all the king's livings of the value of £20 *per annum* or under, in the sovereign's books. He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the Court of Chancery. The *Chancellor of the Duchy of Lancaster* is the chief judge of the duchy court, which was formerly much used in relation to suits between tenants of duchy lands, and against accountants and others for the rents and profits of the said lands. The *Chancellor of a Diocese* or of a *Bishop* is an officer appointed to hold the bishop's courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university (1 Bl. C. 382). The *Chancellor of the Exchequer* is alone a high officer of the Crown, who sometimes sits in the Exchequer Chamber. His principal duties, however, are not of a judicial character, but concern the management of the royal revenue (3 Bl. C. 44).

**CHANCE-MEIDLEY.**—The acciden-

tally killing a man in a casual affray is so termed; as if, in the course of a sudden broil or quarrel, a person, in the endeavour to defend himself from the person who assaults him, accidentally kill him (4 Bl. C. 184; 4 St. C. 102, 126, 4th ed.).

**CHANCERY.**—The High Court of Chancery is the highest court of judicature in this kingdom next to the Parliament, and of a very ancient institution. The jurisdiction of this court is of two kinds—*ordinary* and *extraordinary*. The *ordinary* jurisdiction is that wherein the Lord Chancellor or lord keeper, in his proceedings and judgments, is bound to observe the order and method of the common law; and the *extraordinary* jurisdiction is that which this court exercises in cases *equity*. The jurisdiction of the ordinary court, that is, the common law jurisdiction of the Court of Chancery, is of much earlier origin than the equitable. It is exercised in issuing commissions, such as relate to charitable uses, idiots, lunatics, original writs, repealing the King's letters patent, holding pleas of petitions, monstrans de droit, traverses of offices, scire facias on recognisance, and, formerly, of such personal actions wherein any officer or minister of the court was a party. This common law jurisdiction is exercised in what is termed the Petty Bag Office. The 12 & 13 V. c. 109 (to regulate certain offices in the Petty Bag in the High Court of Chancery, and the practice of the common law side of that court, &c.), after repealing the 11 & 12 V. c. 94, provides, among other things, that solicitors may practise as attorneys on the common law side of the

Court of Chancery without the intervention of any officer, and that costs shall be allowed as at common law. Proceedings may be had in vacation; pleadings are to be delivered, and issues may be tried in any of the superior courts, though formerly this could be done in the Queen's Bench only. By s. 42, no person whomsoever who now is, or at any time hereafter shall be, an officer of the said Court of Chancery, shall have or be entitled as such officer to any privilege of suing or being sued on the common law side of the said Court of Chancery. With regard to the extraordinary court, or court of equity, being the only court of equity (besides those of the counties palatine and the Duchy of Lancaster, &c.), since the abolition of the Equity Court of Exchequer, by the 5 V. c. 5, it is usually called the High Court of Chancery; the judges thereof are the Lord High Chancellor, two Lords Justices of the Court of Appeal, Master of the Rolls, and three Vice-Chancellors. The Master of the Rolls and the Vice-Chancellors are assistant judges to the Lord Chancellor, and an appeal lies from their decision to him alone, or to him and the Lords Justices sitting together, or to the Lords Justices sitting without the Chancellor. Neither the Lord Chancellor nor the Lords Justices hear original causes—*i. e.* causes are not, without special leave, set down to be heard by them in the first instance: they confine themselves, for the most part, to the hearing of appeals from the decisions of the Master of the Rolls and of the three Vice-Chancellors. Indeed, in lunacy cases, and in some statutory cases, the

Lord Chancellor and the Lords Justices hear original matters. The principal heads or subjects of equity jurisdiction may be described as being—1. Accident and mistake; 2. Account (14 Jur. 795); 3. Fraud; 4. Infants, married women, and persons of unsound mind; 5. Specific performance of agreements and contracts; 6. Trusts; 7. Legacies; 8. Administration; 9. Dower. Even as to fraud, accident, and trusts, which are said (3 B. C. 431) to be the peculiar province of equity, there are many cases which are remedied at law, and, therefore, as Mr. Justice Story observes (1 Eq. Jurispr. 56, 2nd ed.), all that can be ascribed to such general allegations is general truth. Indeed, as to executory agreements and technical trusts, courts of equity have exclusive jurisdiction. Mr. Justice Story adds: "The true nature and extent of equity jurisdiction, as at present administered, must be ascertained by a specific enumeration of its actual limits in each particular class of cases falling within its remedial justice." The writer then proceeds to class the various subject matters of equity jurisdiction under the three following general divisions, namely, concurrent, auxiliary, and conclusive. The most complete and scientific division of equity jurisdiction is that by Mr. Smith (Manual, p. 29, 1st ed.). This division is founded on the distinctive characteristics of the relief afforded, or the general objects sought to be effected. It is as follows:—I. Remedial equity, specifically so termed, including thereunder: 1. Accident; 2. Mistake; 3. Actual fraud; 4. Constructive fraud. II. Executive equity, including there-

under: 1. Legacies; 2. Donationses mortis caust; 3. Express private trusts evidenced by some written document; 4. Express charitable trusts; 5. Implied trusts; 6. Constructive trusts; 7. Trustees and others standing in a fiduciary relation; 8. Specific performance of agreements and duties not arising from trusts. III. Adjustive equity, including thereunder: 1. Account in general; 2. Administration; 3. Mortgages and pledges; 4. Apportionment and contribution; 5. Partnership; 6. Certain special adjustments in cases of debtor and creditor; 7. Miscellaneous cases of account; 8. Damages and compensation; 9. Election; 10. Satisfaction; 11. Partition, settlement of boundaries, and assignment of dower. IV. Protective equity, irrespective of disability, including thereunder: 1. Cancelling, &c., documents; 2. Interpleader; 3. Bills of peace, and to establish wills and injunctions; 4. Writs of ne exeat regno and supplicavit; 5. Appointment of a receiver, &c. V. Protective equity in favour of persons under disability, including thereunder: 1. Infants; 2. Persons of unsound mind; 3. Married women. VI. Auxiliary equity, including thereunder: 1. Discovery in aid of proceedings at law; 2. Preserving testimony.

CHAPELRY.—The same thing to a chapel as a parish is to a church, i. e. the precinct and limits of it (Les Termes de la Ley; 6 Jur. 608).

CHAPMAN.—A dealer, a person who gains his livelihood by buying and selling. This is a term usually applied to traders sought to be made

bankrupts, where the specific trading is doubtful; and indeed it is added after the specification of any particular trade; and its utility will be apparent from this, namely, that under the words "Dealer and Chapman," and the general statement that the bankrupt obtained his living by buying and selling, evidence may be given of *any* species of trading (Henley's Bankr. 10, 3rd ed.).

**CHAPTER.** — An assembly of dignitaries called canons in a church cathedral, and in another signification, a place wherein the members of that community treat of their common affairs. It may be said that this collegiate company is termed chapter metaphorically, the word originally implying a little head; for this company or corporation is, as a head, not only to rule and govern the diocese in the vacation of the bishopric, but also in many things to advise the bishop when the see is full (*Les Termes de la Ley*). By the 3 & 4 V. c. 113, s. 1, all the members of chapters, except the dean, in every cathedral and collegiate church in England, are to be styled canons. These are sometimes appointed by the Crown, sometimes by the bishop, and sometimes by each other (3 St. C. 17, 4th ed.).

**CHARGE OF DEBTS.**—It is very common for testators to charge their real estate with the payment of their debts, the effect of which has given rise to many questions of great nicety. As observed by Mr. Lewin (*Trusts*, p. 173, 3rd ed.), if a person by will charge his realty with debts (or with debts and legacies, or lega-

cies only), the legal estate may descend to the heir, or it may pass to a devisee; but the Court of Chancery will view the charge as an implied declaration of trust, and will enforce the execution of it against the legal proprietor (see also *Burt. Comp.* pl. 1504). One effect of such a charge is to constitute the realty equitable assets, and another is to enable a court of equity to order a sale or mortgage of such estate (*Burt.* pl. 1504), and a sale may take place without the order of such court, though this was doubted in *Robinson v. Lo.* (17 Beav. 592; 18 Jur. 363). One important question has hitherto been, whether such sale shall or shall not be made by the executor. In 1 *Lead. Cas. Eq.* 77, the doctrine is thus summed up: "Where there is a general charge of debts upon real estate, the executors have in equity an implied power to sell it, and they alone can give a valid receipt for the purchase money; but as they do not take by implication a legal power to sell, and cannot convey the legal estate (*Doe v. Hu.*, 6 Ex. 223), the persons in whom it is vested (if it be not already in the executors by devise or otherwise) must concur with them in the conveyance" (but see 2 *Dav. Conv.* 832 n.; *Dart's V. & P.* 400, 476 n.; *Sugd. V. & P.* 545 n., 13th ed.). The reader will find a rather lengthy statement of the various opinions and most recent decisions on the above subject in 1 *L. C. N. S.* 345—353. By the provisions of Lord St. Leonards' Act, the 22 & 23 V. c. 35 (1 *L. C. N. S.* p. 327), which, however, apply only to wills coming into operation after the passing of that act, a devisee in trust of the whole of the testator's



interest, charged with debts or legacies, may raise the same either by a sale or mortgage; and this is extended to the survivors and the heirs or devisees of such survivor, and to trustees appointed under a power or by the Court of Chancery. And if the whole of the testator's interest did not vest in any trustees, the executors, either original or by devolution, may raise the money in the same way; but these powers do not extend to beneficial devisees of the testator's whole interest. Mr. Hunter, in his work on the above statute, remarks, that "when a will contains a charge of debts or legacies, it is often accompanied by an express power to the executor or to the devisee, to raise the money required by sale or mortgage; in such cases no difficulty arises. But the will may contain a mere charge of debts or legacies, without any course being pointed out by which it can be acted upon; it is under these circumstances, that the recent cases have ascribed an implied power of sale, and of signing valid receipts, to the executor. The present act distinguishes the cases where the estate subject to the charge becomes beneficially vested in any person, in fee or in tail, or for the testator's whole estate or interest, from cases where it does not become so vested. In the former class of cases it is the duty of the beneficial owner to discharge the liability to which his estate is subject, and he is competent to do so, inasmuch as he can, out of his interest, make an effectual sale or mortgage, in which he may compel the person having the legal estate under the will to concur, if this be rendered necessary by reason that that estate is devised upon

trust for the absolute beneficial devisee; here then there is no need for a power to raise the amount of the charge, and therefore the act gives none, but leaves the matter to be determined by the old law. When however the estate subject to the charge is not beneficially devised to any person in fee or in tail, or for the testator's whole estate and interest, or, in other words, where the estate is settled by the will, the act makes a further distinction; the devise may be of the whole of the testator's interest to trustees for the objects of the settlement, in which case the 14th section gives to the trustees a power to sell or mortgage for the purpose of raising the charge; or the will may not adopt the machinery of an absolute devise to trustees, but may contain a direct gift of either the whole or of part of the estate to the objects of the settlement; here the 16th section gives to the executors the power to make the necessary sale or mortgage. The powers conferred by the 14th section are, by the 15th, extended to every person in whom the trust estate may have become vested in any manner, except by conveyance *inter vivos*, or who may have in any manner become trustee. This provision obviates, as to this case, the questions which continually arise as to whether powers are transmissible to representatives of the original donees (See 1 Sugd. Powers, 120; *Titley v. Wolstenholme*, 7 Beav. 425). Similarly the power conferred by the 16th section may be exercised by the person in whom the executorship is for the time being vested. It is also by the 16th section declared, that the executor's power shall not be merely equitable, but

shall operate as a common law power over the legal estate, supposing, of course, that such legal estate was vested in the testator. Purchasers and mortgagees are by the 17th section exempted from inquiring whether the powers conferred by the 14th, 15th, and 16th sections, have been correctly exercised in their favour."

As stated by Mr. Burton (pl. 1506), charges of debts upon lands are favoured in equity as acts of justice in the testator [though since his time, the 3 & 4 W. 4, c. 104 has effected nearly the same result]; and, therefore, if he merely commence his will with a direction that his debts shall in the first place be paid, this is held to amount to a charge on the real estate comprised in the will. It is not important in what part of the will the direction is inserted; but a direction that the debts shall be paid by the executors is insufficient, unless they be also devisees of the lands (see the distinctions concisely stated in Burt. Comp. pl. 1506, note by Mr. Cooper; also Dart's V. & P. 400, 3rd ed.).

#### CHARGING IN EXECUTION.—

This is a term applied in respect to defendants in custody, at the suit of the plaintiff, during the pendency of the action. By R. G. H. T. 1853, pl. 124, the plaintiff must charge a defendant (who is a prisoner) in execution within the term next after the trial or final judgment. This rule applies only where the defendant is imprisoned at the plaintiff's suit (Hall v. We., 2 Sc. N. R. 196). If the defendant is in the Queen's Prison at the plaintiff's suit, the mode of charging him in execution is as follows: a side bar rule to acknowledge the custody is

obtained at the Master's office and taken to the keeper, who writes an acknowledgment thereon, which must be dated the same term as the defendant is charged in execution. A *committitur* piece is then made out on parchment, and filed with the clerk of the judgments. This document simply states that the defendant is committed to the custody of the Keeper of the Queen's Prison in an action at the suit of the plaintiff, there to remain until, &c. If the defendant be in the custody of a sheriff, the only thing necessary is to sue out the ordinary *ca. sa.*, and lodge it with the under-sheriff, or his town agent (Williams v. Wa., 4 Dowl. 200; as to the effect of a notice for discharge under Insolvent Debtors' Act, see R. G. H. T. 1853, pl. 128).

CHARGE ON LANDS.—By the 1 & 2 V. c. 110, s. 13, judgments (including decrees and orders of courts of law and equity, in bankruptcy, and in lunacy), for payment of money or costs, operate as a charge upon *all* lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including *copy-holds*), which the debtor, at the date of the judgment or afterwards, is seized or possessed of, or entitled to, for any estate or interest at law or in equity, in possession, reversion, remainder, or expectancy, or over which he has any *disposing power* which he might, without the assent of any other person, exercise for his own benefit; and the charge is binding against all persons *claiming under the debtor* after such judgment, and also against the *issue of his body*, and all other persons whom he might, without the assent of any

other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands and hereditaments. By the same 13th section, the judgment creditor is given the same remedies in a *court of equity*, against the hereditaments so charged, as if the debtor had in writing agreed to charge the same with the amount of such judgment debt and interest thereon: provided that no proceedings in equity to obtain the benefit of such charge are to be taken for twelve months (see *Rolleston v. Mo.*, 1 Dru. & W. 195; 15 Beav. 146; *Yescombe v. La.*, 7 W. R. 534; 1 L. C. N. S. 217). It is also provided that the act is not to be taken to alter or affect any doctrine of equity whereby protection is given to purchasers for valuable consideration without notice. It is also provided, that such charge shall not give the judgment creditor any preference, in case of the bankruptcy of the debtor, unless such judgment has been entered up one year before the bankruptcy (see *Harrison v. Pe.*, 5 L. C. 55, 56). A judgment is now, when registered, what it was not before this act—a *security upon land* (see *Bond v. Be.*, 26 L. J. Ch. 263; 3 Jur. N. S. 1290; 4 L. C. 226, 227), or, as Lord St. Leonards said, it is an equitable estate (1 Dru. & W. 195; but see *Beavan v. Ox.*, 2 Jur. N. S. 121). As above stated, the judgment, to be a charge in equity on the debtor's lands under the statute, must first be registered, but still the judgment is not the less a subsisting charge, because, under s. 13 of the above act, the judgment creditor cannot enforce it in equity till a year has expired from the entering up: the

charge subsists, the remedy only being suspended (exp. *Bayle*, 17 Jur. 979; 1 L. C. N. S. 217; *Fisher's Mortg.* 368). And the charge may be enforced by suit in equity, at the end of a year from the entering up of the judgment, though a year has not elapsed from the registration (*Derbyshire, &c., Co. v. Ba.*, 15 Beav. 146). It is also to be borne in mind that, independently of the above statute, courts of equity will assist the judgment creditor, but only to remove impediments from the legal right, or to protect the property pending disputes at law concerning the title, and in these cases the creditor must first have sued out an *elegit* (*Neate v. Ma.*, 3 My. & C. 421; *Smith v. Hu.*, 1 Col. 705; *Fisher's Mortg.* 35, 36).

**CHARGE ON STOCKS.**—The 1 & 2 V. c. 110, introduced a charge on stocks, funds, annuities, and shares of public companies, and also a mode of enforcing the same. Thus, by sec. 14 of that act, if the judgment debtor has any government stocks, funds, or annuities (1 L. C. N. S. 185), or any stock or shares of or in any public company in England (whether incorporated or not) standing in his name in his own right, or in the name of any person in trust for him, a judge [at chambers, 9 M. & W. 42] of one of the superior courts [of law, re *Coe*, 2 Beav. 300], on the application of any judgment creditor, may order that such stock, &c., shall stand charged with the payment of the amount of the judgment with interest; and such order shall entitle the judgment creditor to all such remedies as he would have been

entitled to if such charge had been made in his favour by the judgment debtor (see *Kinderly v. Je.*, 2 Jur. N. S. 602): Provided that no proceedings shall be taken to have the benefit of such charge, until after six calendar months from the date of such order (see *Watts v. Po.*, 1 Jur. N. S. 183; 1 L. C. 93; 2 L. C. 75—78; 5 L. C. 171; *Scott v. Ha.*, 6 W. R. 862). By s. 18, decrees and orders in equity, and rules of courts of law and orders in bankruptcy and lunacy, for any money or costs, are to have the same effect and the same remedies may be had as in cases of judgments. By the 3 & 4 V. c. 82, the aforesaid provision is to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, &c., as also in the dividends, interest, or annual produce of any such stocks, &c. And an order may be made in respect of any such stocks, &c., standing in the name of the Accountant-General of the Court of Chancery, and the dividends; &c., thereof. By sec. 15 of 1 & 2 V. c. 110, in order to prevent any transfer of such stock, &c., the judge's order is, in the first instance, to be made *ex parte*, without any notice to the judgment debtor, and is to be an order to show cause only; and the order restrains the bank and public companies from permitting a transfer until the order is made absolute or discharged. And if after notice of such order to the trustee or an agent of any corporation, any transfer be made, such corporation or trustee is liable to the judgment creditor for the value or amount of the stock transferred,

or so much thereof as shall be sufficient to satisfy his judgment; and no disposition by the debtor is in the meantime to be valid as against the judgment creditor. And unless the judgment debtor, within a time to be mentioned in such order, shows to the judge sufficient cause to the contrary, the said order is, after proof of notice thereof to the judgment debtor, his attorney, or agent, to be made absolute: provided that the judge may discharge or vary such order and award costs. It is provided, however, by sec. 16, that if the judgment creditor shall cause the person of the judgment debtor to be taken or charged in execution, he shall be deemed to have relinquished all title to the benefit of such charge or security. Notwithstanding an order absolute under the 14th and 15th secs. charging stock standing in the names of trustees, the Bank of England is bound to pay the dividends to the trustees, who are liable in equity for its proper distribution: the bank is not bound to pay the creditor (*Fowler v. Ch.*, 2 D. N. S. 767).

#### CHARGE AND DISCHARGE. —

Formerly, under decrees to take accounts in the master's office, the plaintiff carried in a statement of the several items which he claimed to be entitled, upon proof, to charge the defendant in the account. When this charge was gone through, the defendant brought in his discharge, containing a statement of payments and disbursements made by him, and other matters by which he claimed to *discharge* himself from the claims attempted to be made out against him by the charge. The

orders of 1828 simplified this practice by requiring the accounting party to bring in his account in the form of debtor and creditor, and then any party dissatisfied might examine the accounting party. By Order, 16th October, 1852, pl. 23, no charges or discharges are to be brought in.

**CHARGING PART OF A BILL IN CHANCERY.**—The plaintiff in a suit in equity, after setting forth the subject of complaint, adds such circumstances by way of allegation as are calculated to corroborate his statement, or to anticipate and controvert the claims of his adversary; and such allegations are technically called charges, and the part of the bill in which they occur is termed the charging part of the bill. This part of the bill was, even prior to the new system of procedure, frequently omitted, and now it is still more rarely used, though its introduction may, in some cases, be beneficial (1 Dan. Ch. Prac. 356, 357, 2nd ed.; 15 & 16 V. c. 86, s. 10; Ord. 7 Aug. 1852, pl. 14, and schedule thereto). The charge of confederacy formerly used is now discontinued (Mif. Pl. 32—34, 3rd ed.).

**CHARITABLE GIFTS.**—By several statutes, gifts to superstitious uses are made void, but gifts are good even of lands for the maintenance of a school, or the sustenance of poor people or any other *charitable* uses, provided the same be made in conformity with the 9 G. 2, c. 36, by which no lands or tenements or money to be laid out in the purchase thereof, shall be given or conveyed or any ways charged or incumbered

in trust for the benefit of any charitable uses, unless by deed indented, sealed, and delivered, in the presence of two or more witnesses, twelve calendar months at least before the death of the grantor, and enrolled within six calendar months after its execution in the Court of Chancery, and unless such gift be made to take effect immediately, and be without power of revocation or other clause for the benefit of the donor, or those claiming under him, thus excluding gifts of lands to charitable uses by *will* (Walker v. Ri., 2 M. & W. 882; Att.-Gen. v. Gl., 12 Sim. 84). Where stock in the public funds is to be laid out in the purchase of lands for charitable uses, the transfer (without deed) in the bank books, six calendar months before the donor's death, will suffice. A conveyance by way of *bonâ fide* purchase for a valuable consideration paid at the time, is valid, though the vendor should die the next day (Burt. Comp. pl. 215, n. a.; 9 G. 4, c. 85). The Universities of Cambridge and Oxford, and the foundations of Eton, Winchester, and Westminster, and the British Museum, &c., are exempted from the above restrictions (2 L. C. 159, 286, 289; 3 Id. 283, 368; F. Bk. 162). Any gift which will necessarily bring *fresh* land into mortmain is void; but not where the subject-matter is to be applied on lands *already* in mortmain (Trye v. Gl., 15 Jur. 887; Edwards v. Ha., 1 Jur. N. S. 1189; 3 L. C. 283; 4 Id. 137; re Clancy, 16 Beav. 295; 1 L. C. 10; Philpott v. St. Ge. Ho., 5 W. R. 845; 4 L. C. 137; see other points, 5 L. C. 3). It may be added, that where the trustees of a gift for charitable purposes have, by

the terms of the gift, a discretion to apply the benefit of the gift, either in a way which the law allows of, or in one which it disallows, the gift will not, on that account, be held void, the presumption being that the trustees will act in a lawful manner (*Mayor of Fa. v. Ry.*, 18 Jur. 587; 1 L. C. 86). A conveyance (prior to the 7 & 8 V. c. 101, s. 73) of lands in trust for the overseers and guardians of a parish, for the purpose of being used as a poor-house, is not void, as not being for "a charitable use" (*Burnaby v. Ba.*, 7 W. R. 693; 6 L. C. 283). So a devise of lands to the trustees for the time being of a public library (supported by voluntary subscriptions of its members, who had the use of the books purchased therewith), and their successors for ever, for the use, &c., of such library, is valid (*Carne v. Lo.*, 31 L. T. 229; 5 L. C. 172). Shares in public incorporated companies are not, in general, within the above statute, they being for the most part personal estate, and transmissible as such (11 Jarm. Conv. 141, note by Sweet; 6 L. C. 274; *Hayter v. Ta.*, 6 W. R. 243; 4 L. C. 297). Though not so expressly provided, it has been held that the statute extends to a bequest of money to be produced by the sale of land, even though leaseholds (*Tudor's R. P.* 433; 11 Jarm. Sw. 143).

The statute of 9 G. 2 leaves the disposition of purely personal estate, that is, other than chattel interests in land, quite unrestrained, except where directed to be laid out in land; so that, with this qualification, pure personalty may be given to charitable uses (11 Jarm. Sw. 154);

yet it has been held that a bequest of pure personalty to a charity, the object of which is the purchase and restoration to the church of impropriate tithes, is void (*Denton v. Ma.*, 6 W. R. 233, 742; 4 L. C. 335; 5 Id. 81). A direction that charitable legacies shall be paid out of the pure personalty is sufficient to entitle the charity to the full amount of the legacy as against the *next-of-kin*, but in order to save the charitable legacies from abatement in case the pure personalty should be insufficient to pay not only those legacies, but also the other pecuniary legacies given by the will, an express declaration that they shall have priority seems to be necessary (11 Jarm. by Sw. 149, 557, note; *Sturge v. Di.*, 6 Beav. 462; see for forms of bequest, 11 Jarm. 556—559, 3rd ed.). It has been decided, where there was a gift of charitable legacies out of pure personalty, and there were also non-charitable legacies given which were not directed to come out of the pure personalty, and the personalty savoring of the realty was sufficient for the payment of the latter, that the pure personalty was to be applied primarily to the payment of the charity legacies (*Robinson v. Ge.*, 16 Jur. 955; but see *Tempest v. Te.*, 3 Jur. N. S. 251; 3 L. C. 368; 4 Id. 83). As to marshalling the assets so as to favour legacies given for charitable purposes, see *Pritchard v. No.*, 5 W. R. 733; 3 L. C. 124.

The 9 G. 2 does not extend to Scotland, or, in general, to the colonies (*Whicker v. Ha.*, 31 L. T. R. 319; 5 L. C. 393). By a rule of construction peculiar to charitable gifts, if the donor declares his intention in favour of charity in

general, without any specification of objects; or even if he refers to a past or future specification which he never has made, or does not afterwards make; or if the gift is to a charity which has ceased to exist or is illegal, or which refuses to accept the proffered bounty; though by these means the particular object is become impracticable or unascertainable, yet the main and substantial purpose being charity, that purpose will not be defeated by the failure of the particular object, but the trust will be executed *cy près*—that is, the Court of Chancery or the Crown, by sign manual, will direct its application to some existing purpose consistent, as far as may be, with the spirit of the testator's design (11 Jarm. Conv. Sw. 154, 155; *Salisbury v. De.*, 3 Jur. N. S. 740; 4 L. C. 85, 86; 5 L. C. 28; *Marsh v. Me.*, 5 W. R. 815; 4 L. C. 113, 114; 5 L. C. p. 3, No. 47).

**CHARITIES, CONTROL OF.** — In order to control abuses in charitable gifts, the Crown formerly issued commissions under the 48 Eliz. c. 4, but this now disused (*Tudor's Char. Tr.* 32, 33), and the Court of Chancery interposes for the protection of charities, besides which the Charity Commissioners, as elsewhere stated, have certain powers conferred on them for controlling the administration of the charitable property. Where proceedings are taken in Chancery (which now, in general, require the previous leave of the Commissioners, see 1 L. C. 90; 5 L. C. 131; 6 L. C. 272), the Attorney-General, usually though not necessarily, at the instance of a private person, termed a *relator* (who is answerable for the due conduct of

the proceedings and for the costs) files, *ex officio*, an information in that court to have the charity properly established (3 Bl. C. 428; 2 P. Will. 118; 2 Atk. 328; re *Bedford Ch.*, 2 Swanst. 520; 8 Jur. Dig. 128; 1 Dan. Ch. Pr. 11—18, 2nd ed.). By the 52 G. 3, c. 101, a more summary remedy is given in cases of breaches of trust, or where the direction of the court is required for the administration of the trust, for any two or more persons may, on obtaining the previous sanction of the Attorney or Solicitor-General, apply for relief by petition, which may be heard in a summary way, and the order thereon is to be conclusive, unless appealed against within two years. A very narrow construction has been put upon this act (see re *Hall's Ch.* 14 Beav. 120; re *Manchester New Col.* 16 Id. 616; *Tudor's Ch. Tr.* 34, 35; 2 Dan. Ch. Pract. 1713, 2nd ed.).

**CHARITY COMMISSIONERS.** — In order to the more effectual protection of charities, several recent statutes (16 & 17 V. c. 137, 18 & 19 V. c. 124; 20 & 21 V. c. 76) have provided for the appointment of commissioners, styled "The Charity Commissioners for England and Wales," who have power to examine into charities, and to prosecute such inquiries by their officers, called inspectors; (2) to require trustees and other persons to render to the Board of Commissioners written accounts and statements, or to attend to be examined on oath, in relation to any charity or its property; (3) to authorise suits and proceedings concerning the same; (4) to sanction building leases, repairs, or improvements, or the sale or exchange of

the charity lands, &c. The acts also appoint corporate bodies by the names of "The Official Trustees of Charity Lands," and "The Official Trustees of Charitable Funds," in whom respectively the land, stock, securities and money of charities may from time to time become vested, by order of any court having jurisdiction. Where the appointment or removal of any trustee, or any other relief, order, or direction relating to any charity, shall be considered desirable, it shall be lawful, if the gross annual income exceed £30 (or in London though under that amount) for any person authorised by the board (or for the Attorney-General), to make application, without information, bill, or petition, to the Master of the Rolls, or one of the Vice Chancellors sitting at chambers, for such order as the case may require, without appeal where the annual income is not more than £100. If the gross annual income do not exceed £30, the application may be made to a district court of bankruptcy, or to the district county court. Roman Catholic Charities, the Universities, Cathedrals, Eton and Winchester Colleges are exempted from the invitum jurisdiction of the board (1 L. C. 389; 2 L. C. 120, 281; 3 L. C. 14—17; as to obtaining the commissioners' certificate for instituting proceedings in equity, see 1 L. C. 90; 5 L. C. 131; 6 L. C. 272).

**CHARTER-PARTY.** — An instrument commonly called \* among merchants and seafaring men a pair of indentures, and contains the covenants and agreements made between the owners, masters, and freighters of ships, concerning their merchandise

and maritime affairs. Charter-parties of affreightment settle agreements as to the cargo of ships, and bind the master to deliver the goods in good condition at the place of discharge, according to agreement. More fully, a charter-party is defined to be an agreement by indenture, whereby the owners, masters and freighters of a ship covenant with each other that a particular ship shall be fit and ready to sail, take in such and such lading, carry, and transport the same to such place or places, in consideration whereof the freighters or merchants are to pay so much, &c. (Bac. Abr. Merchant, II.). A charter-party is the term used when the entire vessel is taken, whilst, where the owner of the goods merely bargains for their conveyance on freight, with goods of others, a bill of lading (p. 56) only is generally executed. A charter-party, being only a covenant or agreement, is to be construed according to the intention of the parties, and the usual customs of merchants; but though the terms of a charter-party may be explained by usage, they cannot be altered, nor can any terms be introduced so as to vary the nature of the original contract (*Gibbon v. Yo.*, 2 Moo. 224). Whether a charter-party be under seal or not, an action at law grounded upon it must be brought in the name of the party to it, and not in the name of another to whom he may have assigned his interest (*Splidt v. Bo.*, 10 East, 279). But, in the case of a bill of lading, the law is different, as should have been stated, under that title. This is by the 18 & 19 V. c. 111 (F. Bk. 9; 2 L. C. 123), which was passed to remedy two inconveniences which had been felt



among commercial men as to bills of lading,—first, that the contract did not pass by the indorsement of a bill of lading, whilst the property in the goods did (*Key*, div. Com. Law, pp. 31, 32, 3rd ed.; *Thompson v. Do.*, 14 M. & W. 403; 14 L. J. Ex. 340). Secondly, that a master of a ship giving a bill of lading of goods which had never been shipped could not be considered as the agent of the owner so as to render the latter responsible to one who had made advances on the faith of the bills so signed (*Hubbersty v. Wa.*, 8 Ex. 330). The intent of the above act is to remedy both the above cases. As to the first it recites, that by the custom of merchants a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; and then enacts, that every consignee of goods named in a bill of lading, and every indorsee thereof, to whom the property passes by the consignment or indorsement, shall also have transferred to him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. This provision, however, is not to affect the right of stoppage in transitu, or of claiming freight against the original shipper or owner, or any liability of the consignee or indorsee, by reason of such consignment or indorsement. As to the second branch of the subjects,

the statute appears rather to confirm, with some modification, the doctrine already established, that to introduce any material alteration in the law. After reciting that "it frequently happens that the goods, in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading, in the hands of a bona fide holder for value, should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden," it is enacted by the 3rd section that every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, unless the holder of the bill of lading had actual notice, at the time of receiving it, that they had not been shipped. The person signing the bill of lading, however, may exonerate himself by showing that the misrepresentation was caused without any default on his part, and wholly by the fraud of the shipper or holder, or some person under whom the holder claims. The indorsee of a bill of lading is only liable to be sued on so much of the contract as is expressly incorporated in the bill of lading (*Oliver v. Mu.*, 7 W. R. 254; 1 L. C. N. S. 62).

**CHASE.**—This word signifies a place for the reception of deer and wild beasts of the chase generally, as the buck, doe, fox, roe, &c. A chase is not the same as a forest, or a park, but is of a nature between the two, being commonly less than

a forest, and not having so many liberties and privileges incident to it, and yet of larger extent than a park, and stored with a greater diversity of game, and having more keepers to superintend it. And it is said by Crompton (*Jurisd.* 148), that a forest is no sooner in the hands of a subject than it loses its name, and at once becomes a chase: so that one of the essential differences between a forest and a chase is, that the former cannot be in the hands of a subject, and the latter may; and from a park, inasmuch as it is not inclosed, and has not only a larger compass and more game, but also a greater number of keepers and officers (*Manwood's Forest Laws*, 4 *Inst.* 314; 2 *Bl. C.* 38).

**CHATELS.**—All things which are usually comprehended under the name of goods come under the general name of chattels. The ownership of a chattel is called property; and as persons are said to be seized of land, so they are said to be possessed of chattels (*F. Bk.* 118, 196). Where not disposed of by will, lands go to the heir, whilst chattels go to the personal representative. Chattels are divided into two kinds, real and personal. Chattels real are such as concern real estates, or landed property, and are so called because they are interests issuing out of such kind of property; as the next presentation to a church, terms for years, estates by statute merchant, statute staple, elegit, &c. Chattels personal are generally such as are moveable and may be carried about the person of the owner wherever he pleases to go; such as money,

jewels, garments, animals, household furniture, and almost every description of property of a moveable nature (2 *Bl. C.* 385, 386). Things personal, however, are not confined to moveables; for as things real comprise not only the land itself, but such incorporeal rights as issue out of it, so things personal include not only those tangible subjects of property which are capable of locomotion, but also the incorporeal rights or interests which may grow out of or be incident to them. This class (to which may be assigned the term of incorporeal chattels comprehends, among other species, patent right, or the exclusive privilege of selling and publishing particular contrivances of art, and copyright, or the exclusive privilege of selling and publishing particular works of literature (2 *Steph. C.* pp. 2—10; 2 *L. C.* 229, 230, 332, 405).

**CHATTEL INTEREST.**—An interest, property, or estate in chattels, is so termed. It is more frequently applied to an interest or property in chattels real, as in terms for years, the right of presentation to a church, &c.

**CHIEF, EXAMINATION OF WITNESS IN.**—Every witness who gives his testimony in a trial at nisi prius is first examined by the counsel of the party on whose behalf he is called; and this first examination is termed his examination in chief (*Rosc. Ev.* 146, 9th ed.). He is then subject to cross-examination by the counsel on the other side; which cross-examination may be in its turn succeeded by a re-examination by the counsel who called him (3 *C. & P.* 113; 2 *B. & B.* 297;

Rosc. Ev. 147—151, 9th ed.). It is a general rule that leading questions—i. e., questions which suggest the answer which the examining party is interested in obtaining, or wishes to get, are inadmissible on the examination of a witness in chief. Questions to which the answers yes or no would not be conclusive on the matter in issue, are not in general objectionable. Thus, a witness called to prove that A. and B. are partners, may be asked whether A. has interfered in the business of B. (*Nicholls v. Do.*, 1 Stark. 81); for though he may have interfered, he may not be a partner; and per Lord Ellenborough (*Ibid.*). "I wish that objections to questions leading might be a little better considered before they are made. In general, no objections are more frivolous." Oral proof of a written document cannot be admitted on examination in chief, unless a proper foundation for it be laid by accounting for the non-production of the writing itself, and that where any agreement, communication, or statement is the subject of inquiry, the opposite party may interpose the question, whether it was in writing. Where a witness, on his examination in chief, shows himself decidedly adverse to the party calling him, the judge usually allows the examination to assume the form of a cross-examination; and if the witness stands in a situation which of necessity, makes him adverse to the party calling him the counsel may, as a matter of course, so examine him (*Clark v. Sa.*, R. & M. 126; see *Dickinson v. Sh.*, 4 Esp. 67). At all events, the presiding judge has a discretion as to the mode of examination, in order best to an-

swer the purpose of justice (per Abbott, C. J. in *Bastin v. Ca.*, cited R. & M. 127).

CHIEF RENTS.—Those of the freeholders of manors are frequently so called, and they are also sometimes denominated quit rents, *quieti redditus*; because thereby the tenant goes quit and free of all other services (2 Bl. C. 42). These are very common in Manchester and other places, on grants of lands in fee. These rents are rent-charges, and of them it is said (1 Davids. Convey. 465, 1st ed.), "a pernicious custom exists in many parts of the country of selling land in fee simple, subject to a perpetual ground rent or rent-charge, secured by powers of distress and entry. Such rent-charges are also occasionally charitable and other purposes; and, of course, they cannot be apportioned without the consent of the persons to whom they are payable, a consent which it is almost impossible to obtain in ordinary cases, because to give it, would diminish the security for the payment. Such rent-charges cannot be recovered in an action of debt, unless all the *perñors* of the profits of the land are made defendants; but under the usual powers of distress and entry the whole rent-charge may be levied upon any part of the property. Hence, when the property is sold in lots, great difficulty arises in effectually apportioning the whole rent-charge amongst the several purchasers so as to protect each from being required to pay the whole." If the owner will consent, the technical difficulty arising from rent-charge not being apportionable is got rid of by the

22 & 23 V. c. 85, s. 10 (1 L. C. N. S. 323, 326).

**CHIEF, TENANTS IN.**—All the land in the kingdom was supposed to be holden mediately or immediately of the King, who was styled the lord paramount, or above all; and those that held immediately under him, in right of his crown and dignity, were called his tenants in capite or in chief, which was the most honourable species of tenure, but at the same time subjected the tenant to greater and more burdensome services than inferior tenures did (2 Bl. C. 59).

**CHIEF JUSTICES.**—Each of the superior courts of common law at Westminster has a chief judge who, in the Queen's Bench and Common Pleas, is termed a chief justice, whilst the chief judge of the Exchequer is termed Chief Baron. The chief of the Queen's Bench has an annual salary of £8000, and each of the other chiefs of £7000 per annum (2 St. C. 396, 4th ed.).

**CHILTERN HUNDREDS.**—The stewardship of the Chiltern Hundreds is a nominal office in the gift of the Crown, usually accepted by members of the House of Commons desirous of vacating their seats. "Her Majesty's Chiltern Hundreds" are three in number—namely, Stoke, Desborough and Bonenhams, and are distinguished by the use made of them for parliamentary purposes. By law a member once duly elected is compellable to discharge the duties of the trust conferred upon him, and is not enabled at will to resign it. But by stat. 6 Anne, c. 7, and several subsequent statutes, if any

member accepts of any office of profit from the Crown (excepting officers in the army or navy accepting a new commission), his seat is vacated. If, therefore, any member wishes to retire from the representation of the county or borough by which he was sent to Parliament, he applies to the Lords of the Treasury for the stewardship of one of the Chiltern Hundreds, which, having received and thereby accomplished his purpose, he again resigns (Rogers on Elect. 55; 2 Hatsell, 41; 2 St. C. 387, 4th ed.; note by Christian to 1 Bl. Com.).

**CHIVALRY.**—This word comes from the French *chevalier*; and signifies that peculiar species of tenure by which lands were formerly held, called tenure by knight's service. It is of a martial and military nature, and obliges the tenant to perform some noble or military office unto his lord (3 Bl. C. 62).

**CHOSE IN ACTION.**—This is a phrase which is sometimes used to signify a *right of bringing an action*, and at others the *thing itself* which forms the subject matter of that right, or with regard to which that right is exercised; but it more properly includes the idea both of the thing itself, and of the right of action as annexed to it. Thus when it is said that a debt is a *chose in action*, the phrase conveys the idea not only of the thing itself—i. e., the debt, but also of the right of action or recovery possessed by the person to whom the debt is due. When it is said that a chose in action cannot be assigned at law, it means that a thing to which a right of action is annexed, cannot be transferred to

another together with such right. Thus, if A. owes B. £10, it is obvious that the latter has a debt, and also a right of recovering such debt against A.; now if B. were to assign or transfer his debt, together with his right of recovery, to C., this would be assigning a chose in action, which the law does not allow (Co. Lit. 214 a, 266 a; 2 St. C. 11, 12, 44, 124, 4th ed.). This illustration might be extended to a mere claim for damages, for, though frequently confined to debts, the term chose in action applies also to a right to recover damages for a wrong, independently of any contract between the parties (1 Chit. Gen. Prac. 99, note; F. Bk. 197). As already stated, at the common law no chose in action can be assigned so as to transfer the right to bring an action to the assignee, except in the assignor's name, and this doctrine was emphatically asserted in the House of Lords in a rather recent case (Dixon v. Bo., 2 Jur. N. S. 933; 3 L. C. 153, 154); the only exceptions are, by the law merchant and statutes (Ibid.); such as bills of exchange, promissory notes, bills of lading, bail-bonds (2 L. C. 333; ante, p. 30; F. Bk. 197). A legatee of a chose in action, though of an assignable nature, cannot sue in his own name (Bishop v. C., 17 Jur. 23; F. Bk. 197). When an assignment of a chose in action (including the proceeds of unsold real estate directed to be converted, Lee v. Ho., 4 W. R. 406; Law Prop. 61; The Consolidation, &c. Co. v. Ri., 1 L. T. N. S. 209) is made, notice thereof should be forthwith given to the debtor, or trustee, or other party liable to pay. If there be several assignments, they will have priority

not according to their respective dates, but according to the order in which notice was given, so that it is notice which perfects the transaction and makes the instrument available. This rule is applicable to the bankruptcy or insolvency assignees of the assignor (1 L. C. 93; 2 Id. 75—78, 324; 3 Id. 37, 153; 5 Id. 22, 175; Cavendish v. Ge., 27 E. J. Ch. 314; Re Bair, Id. 548; Re Durand, 1 L. T. R. N. S. 84; 2 L. C. N. S. 25, 26). If the assignment be of a fund in the Court of Chancery a notice to the Accountant-General will not suffice, but a stop order is necessary (3 L. C. 256; Allen v. De Le., 5 W. R. 158).

CHURCH-RATES. — Church-rates are ordinarily stated to be made for the necessary reparation of the church, but it seems that they may also include the repairing the seats, the providing of bread and wine, and other things necessary for the decent performance of Divine service (3 Hagg. Ec. R. 10—16), the salary of pew-openers, the pay of a clerk, the salary of an organist, &c. (T. Smith's Parish Law, 171; 3 L. C. 338). The rates for repairing the fabric of the church are charged on all lands and houses in the parish, and are levied on the occupiers thereof; the rates for the other matters are said to be chargeable, not upon the lands, but upon the person of every occupier of land within the parish in respect of the lands, and this whether he be resident in the parish or not. By some it is said that there ought to be two distinct rates for the above purposes, whilst others maintain that a single rate will suffice (see 3 L. C. 338, 339). It is doubtful whether

there is any power to levy a rate for enlarging a burial-ground; but if there be a rate for that purpose it cannot be mixed up with a rate for repairs of the fabric of the church, otherwise the rate will be bad (*R. v. Ab.*, 23 L. T. R. 206; 18 Jur. 1052; 1 L. C. 94, 314). A rate will be bad if it be unequal, by reason of certain property and persons being omitted, and other property under-rated (*Brown v. Pa.*, 7 W. R. 357; 1 L. C., N. S., 155). Church-rates should be made exclusively to defray the expenses to which a church-rate is applicable (*Reg. v. Wi.*, 12 Jur. 479), and they should not be retrospective (*Chesterton v. Fa.*, 1 Curt. 356, 364), though, unless either expressly or impliedly prohibited by statute, there is no rule of law preventing the making of retrospective rates in other cases (*Harrison v. St.*, 2 H. L. C. 108). Church-rates are, in general, enforced in the ecclesiastical courts; but by the 53 Geo. 3, c. 127 (3 L. C. 187, 188), two justices may, on the complaint of any churchwarden (1 Q. B. 480), order the payment of church-rates (where the amount does not exceed £10; in the case of Quakers, £50; and the validity of the rate, or the liability of the person from whom it is demanded, is not disputed), by any person refusing to pay it. In such case the jurisdiction of the ecclesiastical court is taken away (*Richards v. Dy.*, 3 Q. B. 256; 6 Jur. 1035; *Reg. v. Co.*, 16 Jur. 422). But if the validity of the rate or liability of the person be disputed, the churchwardens must proceed in the ecclesiastical court (*Rex v. Si.*, 4 Ad. & El. 354; *Dale v. Po.*, 16 L. J. Q. B. 322; 11 Jur. 539; re Nun-

nelly, 6 W. R. 654; *R. v. Sh.* 31 L. T. R. 114), The rates are made by the parishioners at large (that is, by a majority of those who are present at a vestry to be summoned for that purpose by the churchwardens *Burder v. Ve.*, 12 Ad. & El. 247), for it is now definitely settled that a rate made by a minority of the parishioners in vestry is not a valid rate. If, therefore, a majority abstain from or refuse to concur in making the rate, no rate whatever can be made (*Gosling v. Ve.* 4 H. L. R. 679; 17 Jur. 939).

**CHURCHWARDENS.**—Churchwardens are the guardians or keepers of the church, and representatives of the body of the parish. They are sometimes appointed by the minister and sometimes by the parish in vestry assembled (2 Jur. 566; 2 Id., N. S. 212), and sometimes by both together, as custom directs; if no custom, then by the joint consent of the minister and parishioners, but if they disagree one is appointed by each (*Bac. Abr. Churchwardens*). They are a kind of corporation, but not so as to bind their successors by seal (*Furnival v. Co.*, 5 M. & Gr. 736); they are enabled by that name to have a property in goods and chattels (but not in lands, except in London, and as hereafter mentioned), and to bring actions for the use and profit of the parish. And a churchwarden is entitled to pursue a suit in equity properly commenced by him while in office, after the expiration of his office. A subsequent churchwarden has, during the term of his office, a right to claim the benefit of a suit in equity instituted by a prior churchwarden, and still in prosecution by him, he being in-

terested in the decree (*Marriott v. Ta.*, 2 Jur. 464). Where a bond is given to churchwardens and their successors, on the death of the survivor, his executor, and not the succeeding churchwardens, must sue thereon (*Viner's Abr. Churchwardens*, D.). The churchwardens (with the overseers) are also, by the custom of some places, and by the 59 G. 3, c. 12, a quasi corporation, for the purpose of holding real property belonging to the parish, and also in some matters relating to the poor law and education (*Dart*, 11, 3rd edit.). It has been decided, that a grant of land to the churchwardens and overseers, for the purpose of building a workhouse, was not within the mortmain acts, even prior to the 7 & 8 V. c. 101, s. 73, (*Burnaby v. Ba.*, 7 W. R. 693; 1 L. C. N. S. 283). Churchwardens may be removed, and then, or at the end of their year, called to account. Their principal duty, as their name imports, is the care of the church, which respects five points: 1, the fabrick or building; 2, the utensils and furniture; 3, the churchyard; 4, certain matters of good order concerning the church and churchyard; 5, the endowments of the church: but they have no interest either in the church or the churchyard (*Bac. Abr. Churchwardens*). And it is no part of the office of a churchwarden to perform or provide for the service of a church during a vacancy in the incumbency: he should act under a sequestration, and as the officer of the bishop and not as churchwarden (*Att.-Gen. v. St. Cr. Ho.*, 2 Jur. N. S. 336). They, with the consent of the vestry, may borrow money on the credit of the church-rates for defraying the

expenses (59 G. 3, c. 134, s. 14; 3 L. C. 187, 188; 5 G. 4, c. 36, s. 2; 2 Jur. N. S. 1024, 1090; *Piggott v. Bl.*, 4 E. F. Moo. 399; *Reg. v. Bi.*, 15 Jnr. 506; 58 G. 3, c. 45, ss. 59, 60; *Farnell v. Sm.*, 15 C. B. 572; 3 L. C. 128). They are also joined to the overseers in the maintenance of the poor, except in new parishes under the 6 & 7 V. c. 37, s. 17; and they cannot supply goods, &c., for the workhouse or poor (55 G. 3, c. 137, s. 6; 2 *Bac. Abr.* 794, 7th ed.). They are empowered to keep persons orderly while they are in church during divine service (*Worth v. Te.*, 13 M. & W. 781; *Burton v. He.*, 10 M. & W. 105). There is no general unqualified right on the part of the rate-payers to inspect the churchwardens' book of accounts, but some special ground must be shown (*R. v. Da.*, 7 W. R. 445). The powers of churchwardens in London are said to be somewhat different (*Pulling's Laws of London*, p. 263; *Rog. Ec. L.* 185).

**CINQUE PORTS** (*quinque portus*).—Five important havens, formerly esteemed the most important in the kingdom. They are Dover, Sandwich, Romney, Hastings, and Hythe; Winchelsea and Rye have since been added. They had similar franchises in many respects with the counties palatine, and particularly an exclusive jurisdiction, before the mayor and jurats of the ports, in which the king's ordinary writ did not run; but by the 18 & 19 V. c. 1 (amended by 20 & 21 V. c. 1), the peculiar jurisdiction of the Lord Warden of the Cinque Ports, both as to the holding of certain courts of law and equity, and the execution of writs, whether of *capias* on mesne process

or of *ca. sa.* or *fi. fa.* on judgments has been abrogated (2 L. C. 148; 4 Id. 138). These ports have a governor, called the Lord Warden of the Cinque Ports, who has the authority of an admiral amongst them, and sends out writs in his own name (3 Bl. 79).

**CIRCUITS.**—In order that suitors may not be put to the inconvenience of coming from the most distant parts of the country to the courts in London, the kingdom is divided into eight divisions, called *circuits*; each circuit embracing several counties, and into which the judges twice a year (*viz.*, after Hilary and Easter Terms) go, for the purpose of hearing such causes as are ready for trial. There is also usually a third circuit for the trial of criminals (*ante*, p. 30).

**CIRCUIT PAPER.**—A paper containing a statement of the time and place where the several assizes will be held, and other statistical information connected with the assizes; this is issued some time previously to each assize.

**CIRCUIITY OF ACTION.**—Is where a party to an action, by an indirect and *circuifous* course of legal proceeding, makes two or more actions necessary—in order to obtain that justice, between all the parties concerned in the transaction, which by a more direct course might have been gained in a single action. As in an action on a contract, in which the defendant, instead of giving in evidence a breach of the warranty in mitigation of damages, allows the plaintiff to recover the full amount of the contract in the first action, and then subsequently commences

against him a cross action to regain the amount to which the consideration had failed. Formerly, indeed, he was compelled to bring a cross action and had no other remedy, but more recently “the cases have established that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, it should seem, of avoiding circuity of action” (per Tenterden, C. J., 2 B. & Ad. 462). And this doctrine has now been so extended, that it may be laid down in general terms that where a defendant has a right of action against the plaintiff in respect of the same subject-matter as that on which the latter is suing him, he may, in order to avoid circuity of action, plead such right of action as a defence to the plaintiff’s claim. The principle on which this depends is said (10 Ad. & E. 221) to be “the scandal and absurdity of allowing A. to recover against B. in one action the identical sum which B. has a right to recover in another against A.” Mr. Broom illustrates the matter by the maxim “*Nemo debet bis vexari pro una et eadem causa*” (1 L. C. 307).

**CIRCUMSPECTE AGATIS.**—The title of the statute 13 Edw. 1 regulating the jurisdiction of the temporal and ecclesiastical courts; the statute is set out in 2 Bac. Abr. p. 489, 7th ed. The date usually assigned to it is 1285, but there seems every reason to believe that it was not in existence at that period. It was however cited as early as 19 Edw. 3. It originally was not a statute, but a writ supposed to have been issued in pursuance of the statute called *Articuli Cleri*, of which, in the form in which it is



printed both in the authentic and ordinary edition of the statutes, it is a repetition and abridgment. It was probably a writ or mandate framed for the purpose of being issued by the king to his judges in behalf of the spiritual courts in or after 1315, and embodying what were then supposed to be the legitimate subjects of their jurisdiction. Its authority as a statute is however no longer questioned (12 Ad. & El. 315; 2 Bac. Abr. p. 489, 7th ed.).

#### CIRCUMSTANTIAL EVIDENCE.—

That evidence which may be afforded by particular circumstances. It is called circumstantial evidence in contradistinction to that species of evidence which is of a more positive and unequivocal nature. It is also called the doctrine of presumptions; because when the fact itself cannot be proved, it may be presumed, by the proof of such circumstances as either necessarily or usually attend such facts (3 Bl. C. 371; 3 St. C. 617, 618; 4th ed.). The presumptions here referred to are very different from presumptions of law, being presumptions arising from particular circumstances; and are inferences which, in general, the jury are at liberty to adopt or reject, though even here their discretion is in some instances controlled by precedent, or the manifest reason of the case (see instances, 3 St. C. 618).

#### CIRCUMSTANTIBUS, Tales de.—

Such as are present or standing by. This phrase is applied to the making up the number of persons on a jury, by taking some of the casual bystanders, who happen to be qualified for serving on a jury. This takes

place when the jurors who are impannelled, from some cause or other, do not appear, or, if appearing, are challenged by either party, and so disqualified. This is rarely necessary in cases to be tried by a common jury; it is frequently necessary in special jury causes, and then the deficiency is made up from the common jury panel, though if sufficient be not found there is then a *tales de circumstantibus* (Com. L. Pract. 163; 3 St. C. 602, 4th ed.; 6 G. 4, c. 50, s. 37).

CITATION.—The process used in the Ecclesiastical Courts to call the party injuring before them. It is the first step which is taken in causes in those courts, and is somewhat analogous to the writ of summons in the common law (3 Bl. C. 100). In the Court of Probate, where no caveat has been entered or default made to the warning thereof, a citation may be extracted, which is the beginning of "contentious" business in such a case (Ord. 7). The citation must be on parchment, and the party taking out the same, or his professional representative, must take it, together with a *præcipe*, to the registry, and there deposit the *præcipe* and get the citation signed and sealed. Personal service of a citation is effected by leaving a copy of the citation with the party cited and showing him the original, if required. If personal service cannot be effected, a citation must be advertised (Rule 58). Before a party can proceed after the service of a citation, an appearance must be entered by or on behalf of the party cited, or an affidavit of personal service must be filed in the registry, or the order

of the judge, founded on an affidavit, and giving leave to proceed, must be obtained and filed in the registry (Rule 8). In the court for *divorce*, &c., the first step of a petitioner is to file his petition, and forthwith thereafter a citation must be issued, which must be on parchment (Rules 4, 7). The practice is similar to that above stated as obtaining in the Probate Court, but where personal service cannot be effected, the judge ordinary may, on motion, either direct substituted service, or dispense with it altogether (Rule 10).

**CITY.**—A town corporate, which has usually a bishop and a cathedral church (Co. Litt. 109 b. and note; 1 Chit. Bl. 109, note).

**CIVILITER.**—in a man's civil character or position, or by civil, in opposition to criminal, process; as "sheriffs who execute process at their peril are answerable civiliter for what they do upon it;" or, "a man may, without his own fault, be possessed of a horse which has been stolen, but nevertheless he is answerable civiliter to the true owner of it" (1 Smith's Lead. Cas. 221; 1 B & P. 409, per Rooke, J.).

**CIVIL DEATH.**—If a man entered into a monastery, or abjured the realm by the process of the common law, he was formerly, and if he is attainted of treason or felony, he still is dead in law; and, therefore, if an estate be granted to any one for his life generally, it would determine by such civil death. For which reason limitations of life estates are usually made "for the term of a man's natural life," which can only

determine by his natural death (1 St. C. 256, 4th ed.; 4 Bl. C. 380; 3 P. Wms. 37, n.).

**CIVIL LAW.**—In its general signification, is the established law of every particular nation, commonwealth, or city; and is the same with that which is commonly called municipal law. In its particular signification, however, it usually means the Roman law, as comprised in the institutes, code, and digest of the Emperor Justinian (1 Bl. C. 80; Gibbon's Hist. Rome, Ch. 44; 1 St. C. 63, 4th ed.; F. Bk. 13).

**CIVIL SIDE.**—The legal business of the assizes is arranged according to the natural division of such cases as are merely civil, in which issues as to civil injuries are decided, and those of a criminal nature, where men are charged with offences against society at large. In the county hall or court in which the trials take place, it is very usual for one side or portion of the building to be appropriated to the hearing of cases of the former character, and the other side or portion to those of the latter. And hence the phrase has become common that the judge is sitting "on the civil side," or "on the criminal side," meaning thereby that he is presiding at *nisi prius*, or trying a prisoner. In the larger circuits it is now customary for two judges to attend together, and then one of them sits on the "civil," the other on the "criminal side."

**CLAIM, CONTINUAL.**—When, formerly, a man was entitled to enter into any lands or tenements of which another was scised in fee or

in tail, and he who was so entitled made continual claim to the lands or tenements before he who was so seised died seised thereof; then even in the event of such person dying seised of the same, and the lands or tenements descending to his heir, he might have made such continual claim, or his heir have entered into the lands or tenements so descended, by virtue of his having made such continual claim. Such a claim must have been made within a year and a day before the death of the person holding the land, and as the claimant could not know when such death would take place, he was, therefore, obliged continually to be making such claim—*i. e.*, at the expiration of every year and a day, in order that he might be sure of his claim being made within a year and a day of the tenant's death; and hence it was termed continual claim (*Litt. s. 414*). By the 3 & 4 W. 4, c. 27, s. 11, it is provided, that no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action under this act to save its operation; the party in possession must have done some act amounting to an admission of the claimant's right—*e. g.*, paid rent or given a written acknowledgment (*Brow. 32*).

**CLARENDON, CONSTITUTIONS OF.**—In the reign of Hen. 2, A.D. 1164, Blackstone states that there are four things which peculiarly merit the attention of the legal antiquarian, one of which is the constitutions of the parliament at Clarendon, whereby the King checked the power of the Pope and his clergy, and narrowed the exemption they

claimed from the secular jurisdiction (4 Bl. C. 422; 3 St. C. 485, 4th ed.).

**CLAUSUM FREGIT.**—Every unwarrantable entry on another's soil the law entitles a trespass, by breaking his close: *clausum fregit*. The words of the disused writ of trespass commanded the defendant to show cause *quare clausum querentis fregit* (3 Bl. C. 209; 3 St. C. 448, 4th ed.). The plaintiff must have actual possession by entry; and, therefore, a *scisin* in law by an heir, or bargainee, or lessee, without entry, will not suffice; but the doctrine of relation has been sometimes applied to give a remedy, though it has been said that such doctrine applies to the case of disseisor and disseisee only (see *Com. L. Princ.* 288, 289; *Barnett v. G.*, 24 L. J. Ex. 281; *Litchfield v. Re.*, 20 L. J. Ex. 51; *F. Bk.* 252).

**CLERGY, BENEFIT OF.**—The benefit or privilege of clergy formerly signified certain privileges which the clergy alone enjoyed. But afterwards other persons were placed upon nearly the same footing with the clergy. It was formerly required that those who claimed benefit of clergy should be able to read; but by the 5 Anne, c. 6, it was enacted, that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit. The benefit was claimable only in capital felonies; and from the more atrocious of these, it had been taken away by various statutes prior to its entire abolition (4 St. C. 504, note; 4 Bl. C. 365, 366, 371).

**CLERICO ADMITTENDO.**—A writ of execution so called, directed to the bishop or archbishop, upon a person's being presented to a benefice recovered in a quare impedit, requiring him to admit and institute such person (3 Bl. C. 412). It is said that a bishop refusing to execute the writ, or making an insufficient return to it, may be fined (3 St. C. 678, n., 4th ed.).

**CLERKS.**—All clergymen who have not taken the degree of doctor, are in law, and in all law proceedings, styled clerks. They are so called, because in the earlier ages all the clerks in the inferior law offices were selected from the clergy (1 St. C. 11, 4th ed.).

**CIVIL INJURIES.**—The violation of a right may in some instances amount to an injury to the particular individual only, but in others it may take the character of an injury to the public at large. When viewed in the first aspect it is usually called a civil injury, when in the last a crime. Thus, the withholding of a debt is a wrong to the creditor, and, consequently, a civil injury; but as it is not considered to affect the public it is no crime. On the other hand, to deprive a man of his money by theft or robbery is held to be a wrong to the public, and, therefore, a crime; though it is also a civil injury, if considered in relation to the damage which the party individually sustains (1 St. C. 137, 138, 4th ed.; 4 Bl. C. 5, 6).

**CLAIMS** (*in Chancery*).—These were introduced by the orders of 22nd April, 1850, with a view to supply the place of the more expen-

sive proceeding by bill (p. 54); but, in consequence of the latter having been simplified, claims are nearly fallen into disuse, and as it is proposed to abrogate the above orders, it will be unnecessary to notice the practice on claims.

**CLERKS TO JUSTICES.**—These are sometimes called also magistrates' clerks, and, occasionally, clerks of petty sessions. Such a clerk is appointed by the justices of each division, and holds his office during pleasure (*exp. Sandys*, 4 B. & Ad. 863). As regards the *county* justices there is no express statutable authority directing his appointment, though such a functionary is frequently referred to in acts of Parliament, and the Legislature has provided for his remuneration, and has, in many cases, directed certain duties to be performed by him. The duties, however, of justices are so varied, and in connection with them there is so much of a professional and formal description, that no bench could possibly act without the assistance of such an officer. Under the Municipal Corporation Act (5 & 6 W. 4, c. 76, s. 102) the justices of every *borough* under that act, to which a separate commission of the peace is granted, are required to appoint a fit person to be clerk to such justices. The clerks to the metropolitan police-courts are appointed by the Secretary of State. To this functionary appertains the duty of seeing that the entire machinery of the court of petty or special sessions is kept in due working order. To him both the justices and the suitors naturally look for the perfecting of all arrangements necessary for the due conduct of

business. To him the justices naturally look for advice upon all points involving either difficulties of law or practice; and to him also the suitors apply in most of those instances where the proceedings are merely of a formal or routine description (Saund. Mag. Pract. 3, 4; Burn's Just. tit. "Justices of the Peace"). A clerk to the justices of a borough must not conduct prosecutions when he is a partner of the clerk of the peace for the county (R. v. Fox, 1 Law Tim. Rep. N. S. 216).

#### CLERKS OF RECORDS AND WRITS.

—These are officers of the Court of Chancery, substituted by the 5 & 6 V. c. 103, in the place of the now abolished clerks in court (5 & 6 V. c. 143). They perform (inter alia) the following duties:—The filing, copying, and amending of all informations, bills, demurrers, pleas, answers, and other pleadings and records; the entering of appearances, rules, consents, notes, and memoranda of service; the certifying of appearances and proceedings; the custody of extracts deposited for inspection and copying; the attendance with records and extracts on the judges of the court, on the chief clerks of the judges, and at assizes, or elsewhere; the enrolment of decrees and orders, and all other duties formerly performed by the six clerks, sworn clerks, or waiting clerks, as officers of the court, in relation to suits and matters in equity, and not as attorneys, solicitors, or agents of the parties in suits or matters in equity. Some subsequent statutes have thrown other duties on them. There were originally four clerks of records and writs, but

there are now but three. The business is distributed among them according to the initial letter of the surname of the first plaintiff in the suit.

**CLERK OF THE PEACE.**—This is an officer whose duties in connection with the quarter sessions are very important. He is the representative of the *custos rotulorum*, who is the principal personage among the body of the justices (being usually also the lord lieutenant of the county, though the offices are essentially distinct), being the keeper of the rolls of the peace, and other official county documents. The clerk of the peace is appointed by the *custos rotulorum*. His duties are of a very extensive and responsible nature, comprising, in fact, the arrangement and carrying out of the practical details of the entire sessions. He is, indeed, the instrument which puts and continues in motion the entire process of the sessions, seeing that all the practicable details are conducted with regularity, and that nothing is wanting to give proper and legal effect to the business transacted. The clerk of the peace is usually paid by fees, a table of which is settled by the justices and approved of by the judges of assize. By the 14 & 15 V. c. 55, s. 9, the judges are empowered to recommend (which has in very many instances been acted on, either wholly or in part) to the Secretary of State that he shall be paid by a stated fixed salary, whereupon an order may be made to that effect, and the fees to be received for the future by him are to be paid over to the county treasurer. By a recent report of commissioners appointed to inquire into the costs of prosecutions, &c., it

is recommended that clerks of the peace should be paid by salary instead of fees (see 34 Law Tim. 181).

**CLERKS TO THE JUDGES (Common Law).**—Each judge of the superior courts of common law has two clerks: one called his body clerk, to attend him wherever he goes on judicial duty; the other attends at the chambers of the judges in Rolls' Garden, Chancery Lane, during the customary hours for keeping open the public offices. This clerk grants summonses, draws up orders made by the judge, or consented to. The body clerk attends chambers when the judge is there, takes affidavits, bail, &c., and gets the judge's signature thereto, and regulates the attendance of parties having business before the judge. The clerks are also commissioners for taking affidavits in town within a distance of ten miles, where the deponent cannot attend the judge; but the 22 V. c. 16, authorising the appointment of solicitors as commissioners within that distance has, in a great degree, superseded the clerks (see 4 L. C. 164; 5 Id. 148; 1 L. C. N. S. 243, 397).

**CLERKS TO THE JUDGES (Equity).**—The 15 & 16 V. c. 80 (called the Masters in Chancery Abolition Act), having abolished the office of master in ordinary so far as future appointments are concerned and provided for the release of the then existing masters, contains provisions for the sitting in chambers of the Master of the Rolls and the vice-chancellors for the despatch of such business as can be properly disposed

of in chambers (s. 11). To assist in this kind of business, ss. 16, 17, and 21 of the Act provides that the Master of the Rolls and each of the vice-chancellors may, with the approbation of the Lord Chancellor, appoint two chief clerks to hold their offices during good behaviour (but removable by Lord Chancellor with the concurrence of the judge, s. 25), and may supply vacancies. No person can be appointed chief clerk unless he has been *chief* clerk to a master, or has practised as an attorney or solicitor for ten years at least; but George Whiting, Henry Leman, and Charles Pugh, heretofore chief clerks to masters, were by the act appointed chief clerks of three of the said equity judges. By ss. 18 and 22, each judge may appoint a *junior* clerk to each chief clerk, to continue so during pleasure. By s. 23, both sorts of clerks are to be under the control of the judge, and must attend and perform such duties as the judge shall direct. They are also, by s. 24, subject to the same prohibitions, penalties, and punishments as are imposed, &c., by the 3 & 4 W. 4, c. 94, on officers of the Court of Chancery. By s. 19, the Lord Chancellor may remove any officer appointed under the act who shall engage in any other employment, or shall accept any fee or emolument whatever other than his salary. By s. 20, every attorney or solicitor appointed to any office under the act, must forthwith be struck off the rolls. The duties of the clerks depend upon the jurisdiction exercised by the judges in chambers; for the clerks are only assistants to the judges: and it is fully settled that where a question

arises for determination before the chief clerk of one of the judges, either party has a right to have the opinion of the judge, and this extends to the *minutest matters* (re London, &c., Co., 5 W. R. 794; 4 L. C. 87). In practice, however, the parties are usually content with the decision of the chief clerks. By the above act, the judges sitting in chambers are to dispose of the matters mentioned in s. 26, and such other matters as each judge may see fit, or as may be directed by any general order; and another act (18 & 19 V. c. 134), has extended these matters; and under both acts orders have been issued, mentioning the applications, which will be presently stated. The judges may adjourn the consideration of any matter from open court to chambers, and vice versa (s. 27). The mode of getting before a judge is by summons as at common law (s. 28). The judges are to direct what matters shall be investigated by their chief clerks, and what by themselves (s. 29). By s. 30, the chief clerks are to issue advertisements (prepared by the solicitor), summon parties and witnesses, administer oaths, take affidavits, and, when directed, examine the parties and witnesses either upon interrogatories or viva voce (26 Ord. 16 Oct. 1852). The parties and witnesses duly summoned, but not attending, are liable to process of contempt (s. 31). No form of direction to the chief clerks is required, but the result of the proceedings is stated in a short certificate without a formal report, unless otherwise directed (s. 32; 45 and 46 Ords. 16 Oct. 1852). No exceptions are taken to such certi-

ficate or report, but the parties may take the judge's opinion on any particular point, or within four clear days after the certificate or report is signed by the chief clerk upon the result of the whole proceeding (s. 33; 47 Ord. 16 Oct. 1852). A summons must be taken out (48 Ord. 16 Oct. 1852). The certificate or report signed and adopted by the judge is binding on the parties, unless discharged or varied either by summons at chambers, or by motion in open court within eight clear days after the filing thereof (s. 34; 51 Ord. 16 Oct. 1852). The provisions in ss. 13, 14, and 15, of the 3 & 4 W. 4, c. 94, empowering the masters to make orders for time to answer, for leave to amend bills, and to enlarge publication, are repealed (s. 35); and by ss. 36 and 37, all the powers possessed by the masters are to be exercised by the judges in court or in chambers (see s. 13; 58 Ord. of 16 Oct. 1852).

*Business at chambers* (see 5 L. C. 70, 71).—In pursuance of the 15 & 16 V. c. 80, it has been determined by the judges that the following applications may be made at chambers, viz.: 1, as to guardianship of infants (except the appointment of guardian ad litem); 2, as to maintenance or advancement of infants; 3, for administration of estates under the act of 15 & 16 V. c. 86; 4, for time to plead, answer, or demur; 5, for leave to amend bills or claims; 6, for enlarging publication or the time of closing evidence; 7, for the production of documents; 8, relating to the conduct of suits or matters; 9, as to matters connected with the management of property; 10, for payment into court of purchaser's moneys under sales by order of the

court, and investing same. There are also other matters arising in the course of suits and proceedings, and which were formerly referred to a master, which are taken at chambers. In pursuance of the other act (18 & 19 V. c. 134), by which, as before mentioned, power was given to the Lord Chancellor to direct some of the applications now made to the court to be made at chambers, by an order of the 12th Nov. 1856, the following matters may be disposed of at chambers: 1, applications for payment to any person or persons of the dividends or interest of any stocks or funds standing on the credit of any cause or matter depending in the Court of Chancery to the *separate* account of such person or persons; 2, applications under the 32nd section of the act 36 G. 3, c. 52, in all cases where the sum paid into the Bank of England, or the stock transferred into the name of the Accountant-General under such section, does not exceed £300 cash or £300 stock, as the case may be; 3, applications under the act 10 & 11 V. c. 96, intituled, "An act for better securing trust funds, and for the relief of trustees," and the act 12 & 13 V. intituled, "An act for the further relief of trustees," in all cases where the trust fund does not exceed £300 cash or £300 stock, as the case may be; 4, applications under the Trustee Act, 1850, and the 15 & 16 V. intituled, "An act to extend the provisions of the Trustee Act, 1850," in all cases where any decree or order shall have been made by the court for the sale or conveyance of any lands; 5, applications on behalf of infants under the 12th, 16th, & 17th sections of the act, 1 W. 4, c. 65, in all cases

where the infant is a ward of the Court of Chancery, or the administration of the estate of the infant, or the maintenance of the infant is under the direction of the court. In the 4th of these orders the word "lands" is to be construed according to the definition and interpretation thereof contained in the 2nd section of "The Trustee Act, 1850." Since the above orders some additional matters have been directed to be transacted in chambers, as applications under the Settled Estates Act (see 3 L. C. 169), for directions as to advertisements; under Lord St. Leonards' Act, the 22 & 23 V. c. 35, s. 30, for opinion and advice as to the management, &c., of trust property: some of the judges, however, require a petition to be presented under this last act. Ordinarily a decree or order is prosecuted at the chambers of the judge to whose court the cause is attached. But power is given to dispense with this in the vacations by permission of the judge. (Ord. 26th July, 1853).

**CLOSE.**—The interest of a party in any particular piece of land, and not merely, as in its popular acceptance, a close or inclosure (2 Chit. Bl. 17, n. 3; *Stammers v. Di.*, 7 East, 207).

**CLOSE ROLLS AND CLOSE WRITS.**—Certain letters of the king sealed with his great seal and directed to particular persons, and for particular purposes, and not being proper for public inspection, are closed up and sealed on the outside, and are thence called writs close (*literæ clausæ*), and are recorded in the close rolls in the same manner as others are in the patent rolls (*literæ patentes*), or



open letters (2 Bl. C. 346; 1 St. C. 617, 4th ed.).

**CODICIL.**—A supplement to a will, or an addition made by the testator and annexed to the will, being written for its explanation, alteration, or for the purpose of making some addition to, or some subtraction from, the dispositions of the testator as contained in his will (2 Bl. C. 500; F. Bk. 226). It is subject, in general, to the same rules as the original instrument, of which, indeed, it is considered as forming a part (11 Bythew. Convey. 126, Sw.; 1 St. C. 588, 4th ed.). Numerous questions have arisen in regard to the extent to which a codicil affects the dispositions of a will. A primary rule is not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil (*Doe v. Ma.*, 7 Sc. N. R.; *Vesey v. Ve.*, 12 Jur. 548; 11 Byth. 120—125, Sw.). Sometimes a codicil has the effect of impliedly revoking the posterior of two testamentary instruments by referring to the prior one as the actual and subsisting will of the testator (11 Byth. 125). One important effect of a codicil is to make the will speak from the date of the codicil, so as, under the old law, to bring within any general residuary devise which the will might contain lands acquired since the execution of the will (*Pigott v. Wa.*, 7 Ves. 98; *Rowley v. Ey.*, 2 Mer. 128; 11 Byth. 127 *et seq.*).

**COGNATI.**—Relations by the mother's side; the same as *agnati* are relations by the father (2 Bl. C. 235).

**COGNISANCE.**—This word is ap-

plied to that plea or answer put in by the defendant in an action of replevin, when he acknowledges the taking of the distress in respect of which the action is brought, but insists that such taking was legal, as he acted by the command of another who had a right to distrain. Here, it will be observed, the defendant makes an acknowledgment of the fact charged against him, but offers a legal excuse for his conduct (*Trevilian v. Py.*, 1 Salk. 107; 3 St. C. 681, 4th ed.; *Chambers v. Do.*, 11 East, 65; *Com. L. Pract.* 279). The word is also used in the sense of judicial notice or superintendence. Thus, cognisance of pleas signifies the right or privilege granted by the Crown to any person or body corporate, not only to hold pleas within a particular limited jurisdiction, but also to take cognisance of them—i. e., to take judicial notice or superintendence of them. Thus, when a scholar or other privileged person of the university of Oxford or Cambridge is sued in the courts of Westminster for any cause of action, excepting a question of freehold, in such case, by the charter of those learned bodies, the chancellor or vice-chancellor may (which is usually done at the instigation of the defendant: *Will. Pl.* 115) put in a claim of cognisance—i. e., a claim to take judicial superintendence of, or to adjudicate upon, the subject-matter of the action (3 Bl. C. 83, 298). As to Cambridge, the right is abolished as to any person suing who is not a member of the university (19 & 20 V. c. xvii.; 3 St. c. 441 n., 585 n., 4th ed.).

**COGNISOR.**—He who levied a fine

was called the cognisor (2 Bl. C. 350).

**COGNISEE.**—He to whom a fine was levied was called a cognisee (2 Bl. C. 351).

**COGNOVIT ACTIONEM.**—An instrument signed by a defendant in an action, confessing the plaintiff's demand to be just. The defendant, who signs this cognovit, thereby empowers the plaintiff to sign judgment against him, in default of his paying the plaintiff the sum due to him within the time mentioned in the cognovit (2 Bl. C. 304; Com. L. Pract. 291—295). To render the cognovit valid against assignees in bankruptcy and insolvency, if it contain a condition it must be written on the same paper (Com. L. Pract. 291). The cognovit must also be executed in the presence of an attorney for the defendant, who must subscribe his name as a witness to the execution, and thereby declare himself to be attorney for the party, and state that he subscribes as such attorney (1 & 2 V. c. 110, ss. 9, 10; Com. L. Prac. 292—294). To render the cognovit valid against assignees in bankruptcy and insolvency, it, or a true copy, with affidavit of execution, must be filed at the master's office within twenty-one days after execution (Com. L. Prac. 294).

**COIF.**—Serjeants-at-law are called serjeants of the coif, from the circumstance of the lawn coif which they wear on their head, under their caps, when they are elevated to that rank. It was originally used to cover the crown of the head, which was closely shaved, and a border of

hair left round the lower part, which made it look like a crown, and was thence called corona clericalis, or tonsuram clericalem (3 St. C. 367, 4th ed.).

**COLLATERAL SECURITY.**—When a man mortgages his estates as security to a party lending him a sum of money, he also may, and formerly very frequently did, enter into a bond, as an additional or collateral security. A collateral security is, therefore, something in addition to the direct security, and in its nature usually subordinate to it; and it is in the nature of a double security, so that when one fails, the other may be resorted to. The term is also applied where only one security is taken, as where a man mortgages his life interest in lands, and assigns a policy of assurance on his life in the same deed. As to the preparation of collateral securities by separate deeds, and as to the stamps, see 2 Dav. Conv. 917, 921, 2nd ed.

**COLLATERAL CONSANGUINITY OR COLLATERAL KINDRED.**—That which exists between persons who are derived from the same stock or ancestors, however remote. Every person who is descended or propagated from the same stem (*i. e.*, from the same male or female lineal ancestor), from which any other particular person is descended or propagated, and who is neither the immediate parent or progenitor, nor the progeny of such particular person, is properly and aptly denominated or defined to be a collateral relative. And when any person is the collateral relative of any other person, all the descendants from such persons,

reciprocally and respectively, are collateral relations (2 Chitty's Bl. 204, note 5; 2 St. C. 206, 255, 4th ed.).

**COLLEGIATE CHURCH.**—A church built and endowed for a body corporate, such as of a dean or canons or prebendaries, independently of any cathedral (2 St. C. 14, note, 4th ed.).

**COLLIGENDUM BONA DEFUNCTI.**—When a person dies intestate and leaves no representative, or creditors to administer; or, leaving such representatives and creditors, they refuse to take out administration, &c., the ordinary might formerly have committed administration to such discreet person as he approved of, or have granted him these letters *ad colligendum bona defuncti* (to collect the goods of the deceased), which constituted him neither executor nor administrator, his only business being to take care of the goods, and to do other acts for the benefit of those entitled to the property of the deceased (2 Bl. C. 505). The grant of administrations is now made by the Court of Probate; and by 20 & 21 V. c. 77, s. 73, power is given to appoint limited administrators where deemed necessary by reason of insolvency, though there be persons entitled to administration, but nothing is said as to granting letters *ad colligendum*.

**COLLOQUIUM.**—That part of the declaration in an action for slander which alleges that the words were spoken of and concerning the plaintiff, or of and concerning the plaintiff in the way of his trade or profession, &c. The word is commonly used,

not in its strict sense, as denoting a conversation or discourse on the subject-matter previously stated in the declaration, but as a general averment that the publication was made of and concerning those facts.

**COLOUR.**—A technical term used in pleading, to signify that apparent right of the opposite party, the admission of which is required in all pleadings, by way of confession and avoidance; for a plea giving no colour ought to be by way of traverse (3 St. C. 574, note, 4th ed.). As to pleadings by way of confession and avoidance, it is, as the name imports, of their very essence to confess the truth of the allegation which they propose to answer or avoid, which formerly was done by an introductory sentence—True it is that, &c., preceding the defence relied upon in answer. But, though this formal admission is now generally abandoned, it is still essential that the confession clearly appear on the face of the pleading. In many cases it is absolute and unqualified; as in an action on a covenant, a plea of release admits absolutely the execution of the covenant and the breach complained of; but in some, the confession is of a qualified kind, or *sub modo* only. Thus, to an action of trespass for taking the plaintiff's corn, a plea that the defendant was rector, and that the corn was set out for tithe, and that he took it as such rector, would be a good plea by way of confession and avoidance. For, though there is no direct confession that the defendant took the plaintiff's corn, as alleged in the declaration, but, on the contrary, an assertion of a title to the corn in himself, yet the plea implies that the plaintiff was the original owner, and entitled against

all the world, except the defendant. There is, therefore, a confession, so far as to admit some sort of apparent right or colour of claim in the plaintiff, and is therefore within the rule laid down by pleaders on this subject, that pleadings in confession and avoidance should give colour. The colour thus explained, inherent in the structure of all pleadings in confession and avoidance, is termed implied colour, to distinguish it from express colour, which, instead of an implied admission, is a direct and positive assertion of an apparent title in the opposite party, introduced into pleadings of this nature to satisfy the rule as to confession or admission. This latter kind of colour (of rare occurrence, but to which reference was most usually made when that technical term was used *per se*) was till lately employed when the pleader was desirous of pleading by way of confession and avoidance in preference to a traverse, and the facts of his case admitted no sort of title in the opposite party, or, in other words, gave no implied colour; so that the doctrine of express colour was introduced for the purpose of avoiding the objection that the pleading was an argumentative traverse (Quain's C. L. P. Act, 56). He, then, for the express purpose of giving colour, inserted in his plea a fictitious allegation of some colourable but insufficient title in the plaintiff, which he at the same time avoided by the preferable title of the defendant. And in his replication, the plaintiff was not allowed to traverse the fictitious matter thus suggested, for the fiction thus employed, to prevent a difficulty of form, the law favoured. The practice of giving express colour was latterly confined

to trespass and trover, and in those actions extended to no other pleading than the plea. The form adopted in trespass to land was to allege a defective charter of demise, and in trespass for taking goods, that the defendant delivered the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them (3 St. C. 574, 575, note, 4th ed.). By these allegations a colourable or apparent right was given to the plaintiff in both cases, and the pleas were rendered good, which otherwise would have been defective for want of colour (Stephen on Pl. 229, et seq.; 1 Ch. Pl. 504; 3 Reeves, E. L. 438; Holthouse's Dict. pp. 88, 89. By s. 64 of the C. L. P. Act, 1852, express colour is no longer necessary in any pleading, and it is said that the abolition of special demurrers by the C. L. P. Act, 1852, in effect abolished the necessity for express colour (Quain, 56).

COMMENDA. — The holding a living or benefice in commendam was (where a vacancy occurred) holding such a living commended by the Crown until a proper pastor was provided for it. This might be temporary for one, two, or three years; or perpetual, being a kind of dispensation to avoid the vacancy of the living, and was called a *commenda retinere*. These commendams used to be granted to bishops in the poorer sees (1 Chitty's Bl. 393, and note 46). There was also a *commenda recipere*, which was the taking a benefice *de novo*, in the bishop's own gift, or the gift of some other patron, consenting to the same. But by the 6 & 7 W. 4, c. 77, s. 18, no benefice, &c., shall be thereafter held in commendam (3 St. C. 37, 4th ed.).

**COMMISSARY.**—In the ecclesiastical law is a title applied to those who exercise spiritual jurisdiction in those parts of the diocese which are too far distant from the chief city for the chancellor to call the people to the bishop's principal consistory court without occasioning them great inconvenience. These officers were ordained to supply the bishop's office in the out places of his diocese, or in such parishes as were peculiar to the bishop and were exempted from the jurisdiction of the archdeacon; for where, by prescription and by composition, there are archdeacons who have jurisdiction in their archdeaconries, as in most cases they have, there the office of commissary is superfluous (2 Burn's Ecc. L. 8, 9th ed.).

**COMMISSION OF ASSOCIATION.**—A commission empowering two or more learned persons to be added to, or to associate themselves with, the justices in the circuits (3 St. C. 418, 4th ed.).

**COMMISSION OF CHARITABLE USES.**—A commission issuing under the 43 Eliz. c. 4, out of the Court of Chancery when lands which are given to charitable uses have been misemployed, or there is any fraud or dispute concerning them, to inquire of and redress the same: some institutions are specially exempted, and, indeed, the commissions have fallen into disuse (*ante*, p. 120; 3 St. C. 188, 4th ed.; Tudor's Char. Tr. 32, 33).

**COMMISSION OF LUNACY.**—A commission issuing out of Chancery authorising certain persons called *masters* in lunacy, to inquire whether

a person represented to be a lunatic is so or not, in order that, if he is a lunatic, the Sovereign may have the care of his estate. The inquiry is usually before a jury, though this may, in a proper case, be dispensed with. The proceedings are regulated by the 16 & 17 V. c. 70 (see 2 St. C. 523, and the notes).

**COMMISSION OF THE PEACE.**—A commission from the king under the great seal, appointing certain persons therein named jointly and separately justices of the peace (2 St. C. 650, 4th ed.).

**COMMISSION OF REBELLION**, or, as it was otherwise called, a Writ of Rebellion. Where a party to a suit in Chancery has disobeyed any command of the court properly signified to him, he is said to be in contempt, upon which certain proceedings take place which are known by the name of process of contempt. One of the formula in this process of contempt was formerly a commission of rebellion, which, however, has been abolished in cases of contempt (Ayckb. Ch. Pract. 55, 6th ed.).

**COMMISSION OF SEWERS.**—A commission or authority to certain persons directing them to see drains and ditches, &c., well kept and maintained in various parts of England, under the 23 H. 8, c. 5. The jurisdiction of the commissioners is to overlook the repairs of the banks and walls of the sea coast and navigable rivers; or, with the consent of a certain proportion of the owners and occupiers, to make new ones; and to cleanse such rivers, and the streams communicating therewith. The commissioners are a court of

record. They may assess rates upon the owners of lands within their district, and, in case of refusal to pay, may distrain for the same. The 4 & 5 V. c. 45, provides for taxation in the gross in each parish, to be denominated the General Sewers Tax. The commissioners are subject to the jurisdiction of the Court of Queen's Bench (5 Burn's Just. 993, *et seq.*, 29th ed.; 3 St. C. 432, 434). The management of the sewers of the metropolis is provided for by the 18 & 19 V. c. 120, ss. 146—148. As to making new sewers and the assessment in respect thereof, when done by the local authorities, see 18 & 19 V. c. 121, s. 22; 5 L. C. 169—171.

**COMMISSION TO EXAMINE WITNESSES.**—Where a person required as a witness on the trial of a cause is out of the jurisdiction of the court, a commission may be issued for his examination at any place out of the jurisdiction, which examination may be afterwards read in evidence at the trial, if it be made to appear to the satisfaction of the judge that the examinant is beyond the jurisdiction of the court, &c. (1 W. 4, c. 22, ss. 1, 4, 10; Com. Law Pract. 172—175). Where a witness is within the jurisdiction, and is about to leave the country, or is ill, &c., an order or rule for his examination may be obtained, but no commission is necessary (Com. Law Pract. 174).

**COMMISSION TO TAKE ANSWERS IN EQUITY.**—Formerly, when a defendant in a suit lived more than twenty miles from London, a commission was granted to take his answer in the country; but this commission is no longer required

where the defendant lives within the jurisdiction; the answer is filed like an affidavit (15 & 16 V. c. 86, s. 22).

#### COMMON, OR RIGHT OF COMMON.

— An incorporeal hereditament: being a profit which a man hath in the land of another (4 El. & Bl. 485), as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like. And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers. Common of pasture is a right of feeding one's beasts on another's land, and is either appendant, appurtenant, because of vicinage, or in gross. Common of pasture appendant is a right belonging to the owners or occupiers of arable land to put upon the lord's waste commonable beasts, which are either beasts of the plough, or such as manure the ground. Common of pasture appurtenant (frequently confounded with common appendant), arises from no connection of tenure, nor from any absolute necessity, but may be annexed to lands in other lordships, or extend to other beasts besides such as are generally commonable, as hogs, goats, or the like, which neither plough nor manure the ground. This, not arising from any natural propriety or necessity like common appendant, is therefore not of general right, but can only be claimed by grant, or by usage and prescription, which latter the law esteems sufficient proof of a special grant or agreement originally made for this purpose. Common of pasture, because of vicinage or neighbourhood, is where the inhabitants of two townships which lie contiguous to each other, have usually intercommoned with one another, the

beasts of the one straying mutually into the other's field, without molestation from either (*Heath v. El.*, 4 B. N. C. 388; *Jones v. Ro.*, 10 Q. B. 581; 5 L. C. 5). Common of pasture, in gross or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed, or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any other landed property, and may be vested in one who has not foot a of ground in the manor. All these species of pasturable common may be limited as to time, and are limited as to number, but in the case of common in gross it may be without stint (*Co. Litt.* 122 a., n. 15). Common of piscary is a liberty of fishing in another man's water, as common of turbary is a liberty of digging turf upon another man's ground (20 L. J. Q. B. 138). There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects, though in one point they go much further, common of pasture being only a right of feeding on the herbage and vesture of the soil which renews annually; but common of turbary and those aforementioned are a right of carrying away the very soil itself. Common of estovers or estouviers, that is, necessities (from *estoffer*, to furnish), is a liberty of taking necessary wood for the use or furniture of a house or farm from off another's estate. These several species of commons do all originally result from the same necessity as common of pasture, viz., for the maintenance

and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary for his fuel, and estovers for repairing his house, his instruments of tillage, and the necessary fences of his grounds (2 Bl. C. 32—35; 2 L. C. 286, 287; 5 Id. 4, 5, 74, 109, 184; 1 St. C. 653, 4th ed.; as to the respective rights of the lord and the commoners, see 2 L. C. 286, 287).

**COMMONALTY.** In its general signification means the commoners of England, though some writers seem to suppose that it applies more to the middle class of society, i. e. to the better and more influential sort of commoners. The commonalty is also one of the component parts of an incorporated company; which usually consists of the masters, warders, and commonalty; the two first being the chief officers or members, and the latter those who are usually called of the livery (1 Bl. C. 402; 2 St. C. 608, 618, 4th ed.).

**COMMON BAR** [p. 47]. A plea was so termed, which was frequently pleaded by a defendant in an action of trespass *quare clausum fregit*. In this action, if the plaintiff declared against the defendant for breaking his close in a certain parish, without otherwise particularising or describing the close, and the defendant himself happened to have any freehold land in the same parish, he frequently affected to mistake the close in question for his own, and pleaded what was called the common bar, viz., that the close in which the trespass was committed was his own freehold, which com-

pelled the plaintiff to a new assign, i. e. to assign his cause of complaint over again, alleging that he brought his action in respect of a trespass committed upon a different close from that claimed by the defendant as his own freehold. Now, however, a defendant cannot well affect ignorance with regard to the real close, as by a rule of court (Trin. Term. 1853, p. 18), the plaintiff is now bound to particularise the close or place in the declaration, by assigning to it its familiar name, or by describing its abutments or other sufficient description. The above-mentioned plea is also called a bar at large and a blank bar (Steph. Plead. 250, 4th ed.).

**COMMON BENCH.** The Court of Common Pleas was formerly so called, because the causes of common persons were tried and determined in that court. The expression is used even now to distinguish the regular reports of the court, being termed the Common Bench Reports.

**COMMON FORM BUSINESS.** This is defined by the Probate and Administration Act (the 20 & 21 V. c. 77) to mean the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature, to be taken in the Court of Probate in matters of testacy and intestacy, not being proceedings in any suit; and also the business of lodging caveats against the grant of probate or administration.

**COMMON INTENT.** "Certainty in pleading has been stated by Lord Coke (Co. Litt. 308) to be of three sorts, viz., certainty to a common intent, to a certain intent in general, and to a certain intent in every particular. By a common intent I understand that when words are used which will bear a natural sense, and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail; it is simply a rule of construction, and not of addition. Common intent cannot add to a sentence words which are omitted" (Per Buller, *J. Dovaston v. Py.*, 2 H. Bl. 527; 2 Smith's L. C. 93).

**COMMON LAW.** These words are used—1st, as designating that branch of the municipal law of England which does not owe its origin to parliamentary enactment, and which, as opposed to the latter, is termed the *lex non scripta* or unwritten law; 2ndly, as designating a particular section or division of the *lex non scripta* or common law, as distinguished from some other section or division of the *lex non scripta* or common law. As to the first of these, the law of England is composed of acts of parliament or statutes, and the custom of the realm. The custom of the realm consists of those rules and maxims concerning the persons and property of men that have obtained by the tacit consent and usage of the inhabitants of this country, being of the same force with acts of the legislature, the difference between the two being, that with regard to the one, the consent and approbation of the people is signified by their immemorial use and practice; whilst, with regard



to the other, their approbation and consent are declared by parliament, to whose acts the people generally are deemed to be virtually parties. The custom of the realm, as above described, from the circumstance of its being the common or ordinary law of the land, as formerly administered between man and man, is denominated the common law of the realm, and under which denomination is comprised all the law of this country, excepting the statute law. The custom of the realm, or common law, as it is termed, includes not only general customs, or such as are common to the whole kingdom, but also the particular customs which prevail in certain parts of the kingdom, as well as those particular or peculiar laws that are by custom observed only in certain courts and jurisdictions. Thus the custom of gavelkind in Kent, which ordains, amongst other things, that not the eldest son only shall succeed to the inheritance, but all the sons alike, although at variance with the general law of the land, is yet deemed a part of the common law. So the civil and canon laws, as administered in our ecclesiastical and admiralty courts, having obligation in this kingdom, not upon their own intrinsic authority, but simply by custom, are also regarded as a part of the customs of the realm or common law (see 1 Reeves's Eng. Law, 1, 2; Hale's Hist. C. L. 1, et seq.; 1 Bl. C. 64). 2ndly. The phrase common law is frequently used to express that department of the law of which the superior courts of law at Westminster take especial cognizance, and by which the proceedings and determinations in those courts are guided and directed, as

distinguished from the principles and practice of equity, of which the Court of Chancery and the other equity courts take especial cognizance. The phrase common law is also frequently used in practice to signify the forensic proceedings and principles of our courts of common law, as opposed to some other practical department of the law, as, for instance, the conveyancing department, the chancery department, &c. (F. Bk. 2, 4).

**COMMON PLEAS.** One of the superior courts of common law sitting in Westminster Hall. The proceedings in this court are the same as those in the other courts of common law. It alone has jurisdiction in the few surviving cases of *real actions*; and it has alone jurisdiction in the cases of forms substituted for fines and recoveries (3 St. C. 392, 4th ed.); also on appeals respecting parliamentary voters, and under the Railway and Canal Traffic Act (17 & 18 V. c. 31; L. C. 135, 325, 379; 5 Id. 51, 86; F. Bk. 389).

**COMMON SERJEANT.** This is a judicial officer attached to the corporation of the city of London, who (among other duties) assists the recorder in disposing of the criminal business at the sessions, and attends the Lord Mayor and Court of Aldermen on court days.

**COMPERUIT AD DIEM** (*he appeared at the day*).—The name of a plea in an action of debt on a bail bond (Com. Dig. Pleader, 2 W. 31).

**COMPOSITION WITH CREDITORS.**—The usual mode of a debtor's effecting an arrangement with his

creditors for his release from his liabilities, on payment of a portion of their claims, is by executing a deed of composition. This deed ordinarily conveys or assigns the estate of the debtor to trustees for the benefit of the creditors, or such is effected by a distinct deed. In some instances no conveyance or assignment is made, but the debtor or some friend pays down or gives negotiable instruments for the sum which will pay the agreed composition. Where the debtor can pay in full, and merely wants time, a simple agreement to that effect is sometimes made, but the ordinary course is to execute a deed of inspection, by which the debtor is enabled to carry on his business for the benefit of the creditors under the inspection of trustees. The Bankrupt Law Consolidation Act, 1849 (ss. 224—229), provides for arrangements by deed entered into by a debtor and his creditors out of court (see *ante*, p. 25). It may be here added, that the deed should provide for the distribution of the whole of the debtor's estate among all his creditors, and not merely those who execute (F. Bk. 222; 31 L. T. R. 253; 4 L. C. 126). None of the debtor's property must be excepted, or given back to him (Cooper v. Th., 1 El. & B. 554; March v. Wa., 1 H. & N. 158). Every instrument of composition between a debtor and his creditors ought to be by deed (Co. Litt. 212, b.; Lowe v. Eg., 7 Princ. C. L. 604). Still an unexecuted composition agreement will be a good answer to an action by a creditor for his original debt, if he accepted the new agreement in satisfaction thereof, because for such an agreement there is a good consideration to each

creditor—namely, the undertaking of the other unopposing creditors to give up a part of their claim: it would be otherwise if the deed were between the debtor and a single creditor merely (Boyd v. Hi., 1 H. & N. 947; 3 L. C. 319; Lyth v. Au., 7 Ex. 669). The assent of a creditor to a composition may be either express or implied; in equity a creditor is, in general, as much bound by acting under a deed of composition as if he had signed the deed (Butler v. Rh., 1 Esp. 236; Exp. Sadler, 15 Ves. 52); and he will also be entitled to the benefit thereof (Field v. Do., 1 Dru. & W. 227; Biron v. Mo., 24 Beav. 642; Raworth v. Pa., 25 L. J. Ch. 117; see 27 Id. 188; 2 L. C. 307, 385, 386). Where a debtor conveys property in trust for his creditors, to whom the conveyance is not communicated, the deed is revocable; but this does not apply where the deed is made to one who has a beneficial interest under it, as to a trustee for a benefit of himself and other creditors, and it is communicated to, and assented to by, such trustee (Acton v. Wo., 5 My. & K. 495; Smith v. Ke., 6 C. B. 136; Siggers v. Ev., 5 El. & Bl. 367; Harland v. Bi., 15 Q. B. 713; Cornthwaite v. Tr. 4 De G. & Sm. 552). A covenant not to sue the debtor at all is a release, but not a covenant not to sue within a limited time (Ford v. Be., 11 Q. B. 852; Webb v. Sp. 12 Q. B. 898). Where the debtor is a trader within the meaning of the bankruptcy law, the execution by him of an assignment of all his property to trustees for the benefit of his creditors, is an act of bankruptcy (p. 10), but after three months it cannot be taken advantage

of if the trustees executed within fifteen days after the execution by the trader, and such respective executions were attested by an attorney, and notice given within one month in the London Gazette and newspapers, such notice containing the date and execution of such deed, and the name and place of abode respectively of every such trustee and attorney (12 & 13 V. c. 106, s. 68; 1 L. C. 196, 263, 440; 5 L. C. 13, 14). In consequence of the above provision and also that in 1 & 2 V. c. 110, s. 59 as to insolvents, trustees are often exposed to great hazard during three months after a composition deed has been executed, on account of its liability to be avoided by those statutes (1 Crabb's Preced. Convey. 564; 1 L. C. 196, 263, 440). A bankruptcy may be annulled after the bankrupt has passed his last examination, if nine-tenths in number and value of his creditors present at two advertised meetings agree to accept a composition (12 & 13 V. c. 106, s. 230; 5 L. C. 15). That a creditor cannot recover on any securities he may have taken unknown to the other creditors in addition to those mentioned in the composition deed, see *Higgins v. Pi.*, 4 Ex. 312; 4 L. C. 90; 2 L. C. 312. That the creditors must, in general, sign or agree to the deed within the time limited for that purpose, see 1 L. C. 20; 4 Id. 260; as to where no time is limited, see 4 L. C. 332; as to the effect of leaving the amount of debt blank, see *Fitzakerly v. Kn.*, 27 L. T. R. 219; 3 L. C. 129; that where the debtor's business is to be carried on for the benefit of the creditors, they become parties, and are liable as such, see *Hickmann v. Co.*, 2 Jur.

N. S. 884; 3 L. C. 154; as to the effect of general words in passing particular species of property, see *Watson v. Mc Le.*, 6 W. R. 721; 5 L. C. 84, 85; also *Cort v. Sa.*, 27 L. J. Ex. 378; 5 L. C. 173; *Ringer v. Ca.*, 3 M. & W. 43; 2 Jur. 256.

**COMPOSITION, REAL.**—A composition, or, as it is termed, a real composition, is an agreement made between the owner of lands and a parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes by reason of some land or other real recompense given to the parson, in lieu or satisfaction thereof. By 13 El. c. 10, in general, no composition is good for any longer term than three lives or twenty-one years, though made by consent of the patron and ordinary.

**COMPOUNDING FELONY** is the taking of a reward for forbearing to prosecute an offence of that description, and one sort is where a person has been robbed, and, knowing the felon, he receives back from him his goods that were stolen, or some other amends, upon agreement not to prosecute (4 Bl. C. 133; 4 St. C. 299, 4th ed.; see 7 & 8 G. 4, c. 29, s. 59; 8 & 9 V. c. 47; as to advertisements, *F. Bk.* 304).

**COMPOUNDING MISDEMEANORS.**—When a person is convicted of a misdemeanor affecting an individual, the courts permit the defendant to speak with the prosecutor, before any judgment is pronounced, and if the prosecutor is satisfied, to inflict a nominal punishment (4 St. C. 301, 4th ed.; 4 Bl. C. 364, 136, n. by Chr.)

**COMPOUNDING PENAL ACTIONS.**

—Any informer, under a penal law, making composition without leave of the court, or taking any money or promise from the defendant to excuse him, forfeits £10, and may be imprisoned and fined, and cannot afterwards sue on any penal statute (18 El. c. 5; 56 G. 3, c. 138; F. Bk. 305; R. v. Be., 9 C. & P. 368; 4 St. C. 301, 4th ed.). By R. G. H. T., 1853, pl. 118, 119, leave to compound a penal action is not to be given in cases where a part of the penalty goes to the Crown, unless notice has been given to the proper officer, but in other cases it may. The rule for compounding any *qui tam* action must express therein that the defendant thereby undertakes to pay the sum for which the court has given him leave to compound such action.

**COMPROMISE OF ACTIONS.**—A client may settle the action in which he is a party without the consent or even knowledge of his attorney, unless, indeed, he do so expressly to cheat the attorney (*Jordan v. Ha.*, 3, Dowl. 666; Com. L. Pract. 51, 52).

**COMPUTE, RULE TO.** In cases where the plaintiff has an interlocutory judgment, and the amount of damages is a matter of calculation; instead of putting the plaintiff to execute a writ of inquiry, a judge will grant an order directing a master of the court to compute the amount of damages. Formerly a rule called a rule to compute was necessary; but the C. L. P. Act, 1852, s. 92, has abolished such rule, but still an order (or rule) must be obtained. The attendance of wit-

nesses, and the production of documents, may be compelled (Com. L. Pract. 140).

**COMPUTATION OF TIME.**—A month in all statutes means a calendar month, unless the contrary is expressed (13 & 14 V. c. 21). By the common law, a month is a lunar month—*i. e.*, twenty-eight days, except in ecclesiastical matters, and except by custom or obvious meaning of the parties. A tenancy for twelve months is but for forty-eight weeks, but if for a twelvemonth it is good for a year (6 Co. Rep. 62 a; 1 St. C. 283, 284, 4th ed.). A rule for deciding whether a particular day is to be considered as excluded or included is, that when a computation is to be made from an act to be done by the party, the day of doing the act shall be included, but not otherwise (*Webb v. Fa.*, 3 M. & W. 473; *Young v. Hi.*, 6 M. & W. 49; Com. Dig. Temps. A.). Where a statute mentions a certain number of days for doing any act, and the last day falls on a Sunday, the party has not the following day. Sunday, unless specially excepted, counting as one of the days, though the last day. A different rule, indeed, prevails in matters of procedure before the courts, but that is founded on the rules or orders of the courts (*Reg. v. Le.*, 1 L. T. N. S. 92; 2 L. C. N. S. 2; Com. L. Pract. 55, 56). In general the law makes no fraction of a day, except in cases of necessity, and for the purposes of justice (see 8 Ves. 82; 4 Campb. 195; 2 B. & Ald. 586; 4 B. & Adol. 255). It is an established rule, that when a judicial proceeding takes place, it must be considered to have occurred at the earliest possible period of the

day on which it took place (Wright v. Mi., 7 W. R. 498; 1 L. C. N. S. 190).

**CONCLUSION OF LAW.** A conclusion or result at which the law arrives by the application of legal rules or principles to any given state of facts; a familiar instance of which is afforded by the numerous cases in which the law concludes that a promise to pay a certain sum of money is binding upon a party from whose conduct such promise may be implied. So when A. does any given act as agent for B., the conclusion of law is, that B. did such act, upon the principle that *qui facit per alium facit per se* (Holth. 98).

**CONCLUSION TO THE COUNTRY.** Formerly, when a party in pleading traversed or denied a material fact or allegation advanced by his opponent, he usually concluded his pleading with an offer that the issue so raised might be tried by a jury; this he did by stating that he "put himself upon the country;" and a pleading which so concluded was then said to conclude to the country; and the technical phrase itself was termed a "conclusion to the country;" but by C. L. P. Act, 1852, s. 67, no formal conclusion is necessary to any pleading, thus abolishing conclusions to the country, as well as verifications (Quain & Hol. 57).

**CONCORD.**—An agreement entered into between two or more persons, upon a trespass having been committed, by way of amends or satisfaction for the trespass, which, however, is more usually termed accord and satisfaction (see *ante*, pp. 6, 7;

3 L. C. 319). In that species of conveyance which was formerly in use, called a fine, the word concord also occurred; and here it signified an agreement between the parties, who were levying the fine of lands one to another, how and in what manner the lands should pass; and was usually an acknowledgment from the deforciant (or those who kept the other out of possession) that the lands in question were the right of the complainant; and from this acknowledgment or recognition of right, the party levying the fine was called the cognizor, and he to whom it is levied the cognizee (2 Bl. C. 350; 1 St. C. 561, 4th ed.).

**CONDEMNATION MONEY.**—The party who fails in a suit or action is sometimes said to be condemned in the action, and the damages to which such failure has made him liable are hence frequently called condemnation money. Thus in proceedings to enforce a recognisance by writ of *scire facias*, it is laid down that "these persons (the bail) stipulated that if the defendant should be condemned in the action, he should pay the condemnation money or render himself into custody." (Smith's Action at Law, 120).

**CONDITION.**—A kind of stipulation or restraint annexed to a thing, either in a contract, bond, or other specialty, or in a grant. As to conditions in contracts, bonds, and other specialties, see Com. L. Princ. 259, et seq. In the case of grants, the word "condition" is usually associated with the word estate, as an estate upon condition. Estates upon condition are of two sorts. 1. Estates upon condition implied; 2.

**Estates upon condition expressed.** Estates upon condition implied in law are where a grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office generally, without adding other words, the law tacitly annexes thereto a secret condition, that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor, or his heirs, to oust him and grant it to another person (Co. Litt. 233a.; Bac. Abr. Office M.). An estate on condition expressed in the grant itself, is where an estate is granted either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition (1 St. C. 298, 4th ed.). These conditions are therefore either precedent or subsequent. Precedent conditions are such as must happen or be performed before the estate can vest or be enlarged. Subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A. upon his marriage with B., the marriage is a precedent condition and till that happens no estate is vested in A. Or if a man grant to his lessee for years, that upon payment of a hundred marks within the term, he shall have the fee (see 4 L. C. 206, 207), this also is a condition precedent, and the fee simple passes not till the hundred marks be paid. But if a man grant an estate in fee simple, reserving to

himself and his heirs a certain rent, and that if such be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate; in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed (2 Bl. C. 152, 154; 1 St. C. 299, 4th ed.; F. Bk. 146; as to conditions to do illegal acts, &c., see Com. L. Princ. 198—211).

#### CONDITIONS PRECEDENT, &c.—

Conditions (as well as covenants or agreements not under seal, Com. L. Princ. 259), are said to be precedent (otherwise dependent) or concurrent (that is the performance of which by one party is to be concurrent with the performance of some other act by the other party) or independent (that is, where each party may sue for the breach of the other's contract without performing his own part); as to a condition precedent, it is said to be an act essential to be performed by one party prior to any obligation attaching upon another party to do or perform another given act. It has also been defined to be "an act to be performed by the plaintiff before the defendant's liability is to accrue under his contract" (Chitty on Cont. 738). Thus where the purchaser of a house agreed to pay a certain sum of money, provided the pavement in front of the adjoining houses should be laid down by a given day; the completion of the pavement by the specified time was a condition precedent to the purchaser being called upon for the payment of the money—i. e., it was an act which was essentially to be

performed prior to any liability accruing against the purchaser to pay the money. There are not any precise technical words required to constitute a condition precedent, concurrent, or independent: that must be gathered from the words and nature of the instrument which is, as far as possible, to be construed according to the intention of the parties (Selw. N. P. 264, 265; 4 Car. & P. 295; 1 Saund. 320, n. 4; Com. L. Princ. 259).

**CONDITIONAL FEE.**—This seems properly to comprise every fee simple granted upon condition, but is usually understood to refer to that particular species called a conditional fee at the common law, which was a fee or estate restrained in its form of donation to some particular heirs exclusive of others, as to the heirs of a man's body, by which only his lineal descendants were admitted in exclusion of collateral heirs, or to the heirs male of his body, in exclusion both of collaterals and lineal females also. It is said "restrained in the form of 'donation,' for the gift was not considered as in effect restrained to the particular heirs, but was construed by the judges of former days as conferring an estate descendible to the heirs general, subject only to the performance of a certain condition on the part of the ancestor. For they held that such a gift (to a man and the heirs of his body) was a gift upon condition that it should revert to the donor if the donee had no heirs of his body; but if he had, it should remain to the donee. Immediately, therefore, issue was born, the donee was enabled to alien the land, and he usually did so at once; for if the

issue had afterwards died, and then the original donee had died without making any alienation, the land would have descended subject to the restriction of the gift, and in default of heirs of the donee's body, must have reverted to the donor. But by an alienation of the land immediately upon the birth of issue and a subsequent repurchase, the donee became possessed of a fee simple absolute. From these "conditional fees," and the construction put upon them under the Statute of Westminster the Second (*De Donis Conditionalibus*, 18 Ed. 1, c. 1), arose that more familiar form of estate now known as an "estate in fee tail" or an "estate tail" (1 St. C. 240—242, 4th ed.; F. Bk. 122, 123). Annuities and inheritances not within the above statute still remain under the old rules relating to conditional fees, (3 Sc. N. R. 774; 1 L. C. 362).

**CONDONATION.**—A technical term, used formerly in the ecclesiastical, and now in the divorce, court to signify the forgiving by a husband or wife of a breach, on the part of the other, of his or her marital duties. The legal effect of which forgiving or condonation is, that the party cannot subsequently seek redress for an offence already forgiven. For instance, if after his knowledge of the wife's adultery, a husband cohabits with her, such an act of condonation bars him from his remedy of divorce; and a wife is equally barred who has condoned an act of cruelty on the part of the husband. There must be full knowledge of the facts, and in each case the question is for the court (*Peacock v. Re.*, 31 L. T. R. 302). It

is an important exception, however, to the general doctrine of condonation, which is founded on a willingness to heal the disputes of married life, that a subsequent repetition of the crime revives the former offence, and nullifies the intermediate act of condonation by the injured party (Burn's Eccl. Law, tit. Marriage). There have been several cases decided in a new Divorce Court as to condonation, and they agree that it is conditional, and that, assuming certain acts of personal violence to have been condoned by continued cohabitation, subsequent harsh and degrading treatment short of personal violence would *revive* the former acts (Curtis v. Cu., 31 L. T. R. 272).

**CONDUCT MONEY.** — Money paid to a witness living at a distance, and who has been subpoenaed on a trial, sufficient to pay the reasonable expenses of going to, staying at, and returning from the place of trial (see Pract. C. Law, 170); as to recovering back on a countermand, see 2 Jur. N. S. 112).

**CONFEDERACY.** — Two or more persons combining together to do any hurt or damage to another, or to do any other unlawful act.

**CONFESSION AND AVOIDANCE.** — Pleadings in confession and avoidance are those in which the party pleading admits or confesses, to some extent at least, the truth of the allegation he proposes to answer, and then states matter to avoid the legal consequence which the other party has drawn from it (Will. Plead. 120, 121, 309). Of pleas of this nature, some are distinguished as pleas in justification or excuse, others as

pleas in discharge. The former show some justification or excuse of the matter charged in the declaration, the latter some discharge or release of that matter. The effect of the former, therefore, is to show that the plaintiff never had any right of action, because the act charged was lawful; whilst the latter show that though he once had a right of action, it is discharged or released by some matter subsequent. Of those in justification or excuse, the plea of son assault demesne, in an action of trespass for assault and battery (wherein the defendant alleges that the assault complained of was committed in self-defence against the attack of the plaintiff) is an instance; and a common example of those in discharge is, in an action of covenant, a plea of release, wherein the defendant alleges that the plaintiff had, after the breach, released him from all breaches, &c. This division applies to pleas only, and not to replications or subsequent pleadings (Steph. on Pl. 229; 3 St. C. 563, 4th ed.). All matters in confession and avoidance must be *specially* pleaded (R. G. T. T., 1853; Com. L. Pract. 129, 130).

**CONFIRMATION.** — A confirmation is of a nature nearly allied to a release, and is defined by Coke (1 Inst. 295, b.) to be a conveyance of an estate or right in esse, whereby a voidable estate is made sure and unavoidable; or whereby a particular estate is increased; and the words of making it are these, "have given, granted, ratified, approved, and confirmed." An instance of the first branch of the definition may be illustrated in the case of a tenant for life leasing for forty years and dying during the term; here the lease for



years is voidable by him who has the reversion, yet if he has confirmed the estate of the lessee for years, before the death of the tenant for life, it is then no longer voidable but sure (2 Bl. C. 325; 1 St. C. 523, 524, 4th ed.). There may be a confirmation by *implication* of law (Id.; 5 Bing. 469).

**CONGE D'ESLIRE** (leave to elect).—The royal license or permission sent to a dean or chapter when any bishopric becomes vacant, empowering them to proceed to the election of a new bishop (1 Bl. C. 382; 3 St. C. 8, 17).

**CONJUGAL RIGHTS, RESTITUTION OF.**—This is a proceeding (formerly in the Ecclesiastical Courts, but now in the Matrimonial and Divorce Court) by either husband or wife against the other guilty of the injury of subtraction or living separate, without sufficient occasion, with a view to compel the latter to return to cohabitation (4 St. C. 11, 12).

**CONSANGUINITY OR KINDRED.**—Relationship by blood, in contradistinction to affinity, which is relationship by marriage (1 Bl. C. 434; 2 St. C. 206, 255, 4th ed.).

**CONSCIENCE, COURTS OF.**—Courts of conscience, or, as they were otherwise called, courts of request, were courts constituted by act of Parliament in the city of London and other commercial districts, for the recovery of small debts, but they have been nearly superseded by the new county courts (3 St. C. 379).

**CONSERVATOR OF THE PEACE.**—A

preserver of the peace. All officers who in any way have to keep the peace are conservators of the peace (4 Bl. C. 413; 2 St. C. 648; 4 Id. 358, 408, 568, 4th ed.).

**CONSIDERATO CURIAE.**—This phrase used frequently to occur in our pleadings. The judgments of the courts run thus:—*Ideo consideratum est per curiam*—i. e., therefore it is considered (or adjudged) by the court (see 3 St. C. 638, 4th ed.).

**CONSIDERATION.**—This word, as applied to contracts not under seal, (for those under seal *imply* a consideration) generally signifies the thing given in exchange for the benefit which is to be derived from such contract. Thus when A. purchases an estate of B., the money which A. gives to B. in exchange for his estate is the consideration for which such purchase was made. So if I grant a man a lease of a house at £50 per annum, here the annual rent of £50 is the consideration for my granting him the lease. And a consideration of some sort or other (but at law the amount is not important) is so absolutely necessary to the forming of a contract not under seal, that an agreement to do or pay anything on one side, without any adequate compensation on the other, is *nudum pactum*, and so either totally void or voidable in law. The thing, which is the price or motive of the contract, is called the consideration, and it must be a thing in itself lawful, or else the contract is void (2 Bl. C. 442, 443, 444; 2 St. C. 58 a, 122, 123; 7 W. R. 615; Will. Plead. 45, 53). A prior moral obligation, enforceable originally at law,

will support a parol contract (3 L.C. 138).

**CONSIGNEE.**—The person to whom goods are consigned or delivered over (2 St. C. 48, 77, 4th ed.).

**CONSIGNMENT.**—The act of delivering or consigning goods to a consignee.

**CONSISTORY COURT.**—This is the court of every bishop, and is held in their several cathedrals, for the trial of all ecclesiastical causes arising within their respective dioceses. The bishop's chancellor (p. 110), or his commissary, is the judge; and from his sentence an appeal lies by virtue of the same statute to the archbishop of each province respectively (3 Bl. C. 64; F. Bk. 366).

**CONSPIRACY.**—This word is sometimes used to signify an agreement of those who bind themselves by oath or other alliance to aid each other falsely and maliciously to indict men of felony. But the more usual sense of the word is a combination or agreement between at least two persons to carry into effect a purpose hurtful to some individual, or to particular classes, or to the public at large (F. Bk. 305).

**CONTEMPT.**—Contempt of court signifies a disobedience to the rules, orders, or process of a court; this is usually a mere constructive contempt, for which an attachment issues (*ante*, pp. 31, 32); but if the contempt consist in non-payment of money ordered to be paid, a *fieri facias* or an *elegit* may issue (*ante*, p. 31). Where the offence is committed in the face of the court, the

offender may be instantly apprehended and imprisoned at the discretion of the judges without further proof or examination, every court of record having necessarily power to fine and imprison for contempt of its authority (F. Bk. 335; 3 St. C. 364, 696, 4th ed.).

**CONTEMPT (Common Law).**—The common law courts do not consider the neglect of a defendant to do any of the ordinary acts in the course of an action required by the rules of the court, as to appear, plead, &c., as a contempt, but give a remedy by permitting the plaintiff to sign judgment. The process of contempt is by attachment, as to which see *ante*, pp. 31, 32.

**CONTEMPT (Equity).**—Whenever a party to a suit in equity has allowed the appointed time to elapse without doing some act which he is required to do by some order, he is said to be in contempt, and cannot, in general, take any step in the cause until he has purged his contempt, that is, done the act required, and satisfied the party aggrieved for the costs incurred by reason of the contempt. Besides this general disability, he is liable to have proceedings taken against him, leading to his imprisonment, or to the loss of his goods and the profits of his lands, according to circumstances. The contempts in equity are (1) for neglect to appear, for which, however, a more simple remedy is given, as stated *ante*, pp. 20, 31; (2) by neglect to answer; (3) by neglect to do some other act required. The process of contempt is an attachment, as to which see *ante*, p. 31.

**CONTENTIOUS BUSINESS.**—The litigious proceedings in ecclesiastical courts are sometimes said to belong to its contentious jurisdiction, in contradistinction to what is called its voluntary jurisdiction, which is exercised in the granting of licenses, dispensations, faculties, &c. (3 Bl. C. 66). As applied to the new Court of Probate, all proceedings in that court, or in the registries thereof in respect of business not included under the term "Common Form Business" (see *ante*, p. 145), except the warning of caveats, is termed contentious business (Rules, pl. 1).

**CONTINUANDO.**—In trespasses of a permanent nature, where the injury is continually renewed (as by spoiling or consuming the herbage with the defendant's cattle) the declaration may allege the injury to have been committed by continuation from one given day to another, which is called laying the action with a *continuando*, and the plaintiff shall then not be compelled to bring separate actions for every day's separate injury (3 Bl. C. 212).

**CONTRACTS.**—The law of England recognises only two species of contracts: 1, contracts by specialty, and contracts by parol; the former are, besides those of record, deeds and bonds being under seal; the latter comprises such contracts as are not under seal, and are usually termed simple contracts, and it is this latter class which it is proposed to notice here. A simple contract is said by some to be an agreement upon sufficient consideration to do or not to do a particular thing; by others, more precisely, "where a promise is made on one side and assented to

on the other; or where two or more persons enter into an engagement with each other by a promise on either side" (2 Bl. C. 446; 2 St. C. 47, n. d., 2nd ed.; Com. L. Princ. 131). Simple contracts, or, as they are sometimes termed, parol contracts, are then such as are neither of record nor under seal. In other words, if a contract be made by word of mouth, or even by writing, without seal, it is a simple or parol contract (2 Bl. C. 297, 465; 9 M. & W. 88, 98). Sometimes such a contract is called a simple, sometimes a parol, sometimes a verbal, and at other times an oral, contract. The expressions simple, parol, and even verbal contracts have exactly the same meaning, though at first sight it might seem that this was not the case as to verbal contracts, which expression is frequently considered as synonymous with oral contracts, but the law considers that all simple contracts, whether written or by word of mouth are verbal, whilst the word "oral" is properly confined to simple contracts not committed to writing. The first division, therefore, of simple contracts is into such as are written and such as are oral. Contracts are also either express or implied. Express contracts are such as are stated and agreed upon between the parties in their contracts, as that the one party will sell certain goods and the other will pay for the same an agreed price (2 Bl. C. 443). An implied contract is where, from the conduct or act of the parties, the law implies a promise; this, in fact, is more properly termed an implied promise than an implied contract. Thus there may be an express contract for the performance of work by the

one party, without any agreement by the other to pay for it; in such cases, however, the law implies a promise by the latter to pay a reasonable sum for the work. In some cases the contract and the promise may be considered as implied, as where the promise is inferred from the mere conduct of the parties. The following are important rules as to implied contracts:—1. The law holds a man to have promised where he ought to have done so (*Callendar v. Oe.*, 5 B. N. C. 58). 2. An implied promise must be consistent with the circumstances from which it is implied. 3. No contract can be implied into which the parties were not capable of expressly entering. 4. There can be no implication of a contract or promise where the parties have entered into an express contract providing for the circumstances—*expressum facit cessare tacitum* (2 T. R. 105). It may be added that all simple contracts are of the same degree—that is, they are of equal importance in the eye of the law, whether they be written, oral, or implied; and they are all governed by the same fundamental rules. “There is,” observes C. B. Skinner (*Rann v. Hu.*, 7 T. R. 350), “no such third class of contracts, as some of the counsel have endeavoured to maintain, as contracts in writing.” And as all simple contracts are of the same degree, it has clearly been decided, that, where a contract has been reduced into writing, it is competent to the parties at any time before the breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or alter the former agreement, or to qualify the terms of it, and thus to make a new contract,

which is to be proved (where the former contract is not wholly dissolved) partly by the written agreement, and partly by the subsequent oral terms engrafted on it. It should be mentioned, that, where the contract is, by the Statute of Frauds, required to be in writing, an oral contract will not be admitted to show an additional matter or a subsequent variation in the written contract (see *Milton v. Ed.*, 6 Bro. P. C. 487; 6 Law Mag. N. S. 245; 2 C. B. 835; 5 Jur. 1036; *Goss v. Nu.*, 5 B. & Ad. 58; *Martin v. Py.*, 16 Jur. 1041, 1126; 22 L. J. Ch. 94). This leads to the remark, that, though in general a simple contract will be good if merely oral, yet some statutes require certain contracts or promises to be made in writing, in which case the statutory provision must be complied with. The most important of these statutes is the 29 Car. 2, c. 3, ordinarily called the Statute of Frauds, the provisions of which will be hereafter noticed; but, in the meantime, the reader is referred to Com. L. Princ. pp. 136—180. There is a great difference between a simple contract and a specialty, as to the consideration necessary to support them respectively; for a specialty, unlike a simple contract, imports a consideration, and none need in general be proved—a result due to the supposed deliberation of the acts of sealing and delivering the instrument. The following instance will illustrate this peculiar difference between a simple contract and a contract by deed. If a person wishes to make a gift of goods to a stranger, he must, unless there be a deed of gift, deliver over the goods; for the mere agreement in writing (un-

sealed) will not pass the property to the stranger, because no consideration being mentioned, nor in fact existing, none can be implied, and the contract will be invalid, being a *nudum pactum*. In other words, a simple contract is not valid unless made upon a consideration. But if in the above case the owner of the goods make a deed of gift of them to the stranger, they would effectually pass, though there was no delivery of possession; for in the case of a deed the law imports a consideration, though none be mentioned (see *Irons v. Sm.*, 2 B. & Ald. 552; *Martindale v. Bo.*, 3 B. & Ad. 506; *Reeves v. Ca.*, 5 B. N. C. 139; *Sharr v. Pi.*, 4 Ex. R. 478). Again, if a person, by mere writing (not being a bill or note) promise to pay another a sum of money, without reference to services or other equivalent, this is void, as there is no consideration; but, if this promise were made under seal, it would be valid and enforceable (2 St. C. 50, 51, 2nd edit.). "As if I by deed promise to give you £20; here you shall have an action upon this deed, and the consideration for my promise is not examinable; it is sufficient to say it was the will of the party who made the deed" (per Plowden, in 1 Plowd. Com. 308, 309). A specialty is of so much higher a nature than a mere simple contract that the two cannot subsist at the same time—i. e., not between the same parties and for the same matter. The simple contract is said to be merged or extinguished where a deed is accepted in satisfaction of the simple contract, if the deed is between the same parties and for the same subject-matter, unless, indeed, the deed be a mere collateral security, which

circumstance should appear on its face. In Roll's Abr. 604, it is expressly said, that if a man accept an obligation for a debt due by simple contract, this extinguishes the simple contract debt. So in the case of *Filmer v. Bu.* (2 Sc. N. R. 689), where the plaintiff declared on a parol contract, but it appearing that a deed had been executed in accordance with the terms of the parol contract, it was held that there was no subsisting parol agreement. Of course, where the higher security is between different parties, no merger or extinguishment takes place (see *Holmes v. Be.*, 3 Sc. N. R. 497; 5 Jur. 486). And not merely a simple contract, but also a specialty, is merged in or extinguished by a judgment, unless the contrary is stipulated (see *Exp. Christie, Mont. & Bli.* 362; *Exp. Pennell*, 5 Jur. 899; *Exp. Mostyn*, 17 Jur. 665; 1 L. C. 287, 288; *Re Agnew*, 27 L. T. R. 27; 2 L. C. 380).

CONTRACTU, ACTIONS EX.—Are actions founded upon a contract either express or implied; express when entered into and its terms agreed upon by the parties themselves; implied, when arising out of their legal relation or conduct. Such actions are distinguished from actions not founded on contracts, but arising *ex delicto* (Com. L. Princ. 3).

CONTRA FORMAM STATUTI.—This is the usual conclusion of indictments laid on an offence created by statute. By the 14 & 15 V. c. 12, s. 24, no indictment is to be deemed insufficient for the insertion of the words "against the form of the statute" instead of "statutes," or *vice versa*.

**CONTRIBUTION.**—Is the relief or reimbursement by one man of the loss or payments of another. And this contribution the law insists upon in certain cases:—1st. In the case of general average (*ante*, p. 40), which is a term used to express the contribution, which by the commercial law of every country of Europe is made by the proprietors in general of ship, cargo, and freight, towards the loss sustained by any individual of their number whose property has been voluntarily sacrificed for the common safety, and by the loss of which the ship has been saved. 2nd. Contribution is also due to and may be enforced by one surety or joint contractor, who has been obliged to satisfy the whole demand from his fellow surety or contractor, proportionate to the original liability of each; but it is otherwise between partners and wrongdoers; thus it has been held that one of several partners, who pays money on account of his partners, cannot maintain an action against them for contribution on the ground that he made such payment, not voluntarily, but by compulsion of law (*Sadler v. Ni.*, 5 B. and Ad. 936; *Gow*, App. 20); but it is otherwise where there is a partnership in one transaction only (*Gow*, 79). As to wrongdoers, it is well settled that a contribution cannot be claimed as between them; this, however, is confined to cases where the person claiming contribution must be presumed to have known that he was doing an unlawful act (*per Best*, C. J., *Adamson v. Ja.*, 4 Bing. 72, 78).

**CONTRIBUTORIES.**—This is a term applied to shareholders of a com-

pany when under the process of being wound up. The older acts relative to the winding-up of joint stock companies are the 7 & 8 V. c. 111; 11 & 12 V. c. 45; 12 & 13 V. c. 108, as amended by the 20 & 21 V. c. 78. Some existing companies are still subject to these acts, but they do not apply to companies registered under the Joint Stock Companies Acts, 1856, 1857 (19 & 20 V. c. 47, s. 108; 20 & 21 V. c. 49, s. 11). The definition of a contributory in the 11 & 12 V. c. 45 (the Winding-up Act of 1848) is "every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or administrator of a deceased member, or as a former member of the same, or as heir, devisee, executor, or administrator of a former member of the same, deceased or otherwise howsoever." And it is provided that "the word 'member' shall mean any person entitled to a share of the assets, or accruing profits, of any such company at the time of presenting the petition for dissolving the same, or winding up the affairs thereof, under this act" (*Exp. Luard*, 2 L. T. R. N. S. 3). The definition of a contributory in the act of 1856 is "any existing or former shareholder upon whom calls are authorised to be made by the third part of this act" (s. 65; see 4 L. C. 276). It is provided that the representatives of any deceased contributory shall be liable, in a due course of administration, to the same extent as such contributory would be liable under the third part of the act (s. 65). And by s. 66, as to the liability of existing and former

shareholders *inter se*, that in the case of a company other than a limited company, every transferee of shares shall, in a degree proportioned to the shares transferred, indemnify the transferrer against all existing and future debts of the company; in the case of a limited company, every transferee shall indemnify the transferrer against all calls made or accrued due on the shares transferred subsequently to the transfer. A contributory may present a petition for winding-up (ss. 69, 72); as soon as the creditors are satisfied, the rights of the contributories are to be adjusted among themselves; the surplus is to be distributed; for the purposes of the adjustment, *calls* may be made upon the contributories to the extent of their liability (s. 86). A shareholder in a limited company, who has fully paid up his shares, is a contributory (1 L. C. N. S. 22; 30 L. T. R. 11; 31 *Id.* 15; 4 L. C. 389); so is one who has received free shares, and has paid nothing thereon (1 L. C. N. S. 23; 31 L. T. R. 15; 4 L. C. 117; 1 L. C. 312). That persons induced by fraud to become shareholders are not liable as contributories, see *Exp. Bell*, 2 Jur. N. S. 844; 3 L. C. 125; *Re Ginger*, 28 L. T. R. 42; 3 L. C. 151; 4 L. C. 86; but see *Exp. Letts*, 4 L. C. 45; as to the liability of a retiring director where the company take his shares at par, see *Exp. Walker*, 28 L. T. R. 151; 3 L. C. 218; that though the transfer of shares be not complete, yet if the transferee has been recognised by the company he is liable, see *Exp. Walton*, 3 Jur. N. S. 853; 4 L. C. 86, 117; as to shares in cost-book companies, see 4 L. C. 236; as to ceasing for one year in limited com-

panies, and for three years in other companies, to be shareholders, see 29 L. T. R. 400; 4 L. C. 236; as to the contributory register of limited companies under the act of 1856, see *Re Ogilvy*, 30 L. T. R. 173; 4 L. C. 276; 5 L. C. 95; 31 L. T. R. 333; *Re Greenfield*, 4 L. C. 276; as to the official manager of one company being a contributory to another, see 4 L. C. 414; as to moving to strike out party's name from the list of contributories, see *Exp. Day*, 30 L. T. R. 51; 4 L. C. 210, 211; as to the jurisdiction of the Court of Bankruptcy to make calls, see 4 L. C. 236; as to a transfer of shares to a nominee, see 6 W. R. 477; 5 L. C. 22; where no written acceptance of shares, see 31 L. T. R. 333; 5 L. C. 95; as to contribution where scheme never carried into operation, see 7 W. R. 173; 1 L. C. N. S. 89; where shares not duly forfeited, 7 W. R. 369; 1 L. C. N. S. 118; enforcing order for payment against a contributory, 32 L. T. R. 195; 1 L. C. N. S. 161, 183; illegal conduct of directors, 1 L. C. N. S. 178, 275, 368. It has been very recently decided that the jurisdiction of the Court of Chancery to make a winding-up order in the case of a company registered under the Joint Stock Companies Acts, 1856, 1857, as a *limited* company, is taken away by those acts, and the jurisdiction is vested solely in the Court of Bankruptcy, just as was stated in the First Bk. p. 101 (*Plumstead, &c.*, v. *Da.*, 2 L. T. R. N. S. 8).

**CONTROVERTED ELECTIONS.**—A controverted election is an election which has resulted in the return of one or more members of Parliament, the validity of whose return is dis-

puted by a person entitled to vote, or by the opposing candidate or candidates, on the grounds of bribery, corruption, treating, want of proper qualification, or other causes. The proceeding is to petition the House of Commons, upon which a select committee, consisting of a chairman and four other members of the House, tries the petition by examining witnesses through counsel, and if the allegations contained in the petition be sustained and proved, the first returned member is unseated, and either the petitioner himself declared duly elected, or a writ issued for a fresh election, according to the circumstances of the case (2 St. C. 386, 4th ed. ; 11 & 12 V. c. 98).

#### CONVERSION (Common Law).—

An action of trover and conversion is an action for recovery of damages against such person as had found another's goods and refused to deliver them on demand, but converted them to his own use ; from which finding and converting it is called an action of trover and conversion (3 Bl. C. 152 ; F. Bk. 247 ; 3 L. C. 188, 281 ; 2 Id. 346 ; Com. L. Princ. 217—243). In order to maintain the action, it must appear (1) that the plaintiff had either an absolute or special property in the goods which are the subject of the action ; (2) that the plaintiff had also the right of possession in the goods ; (3) that personal goods constitute the subject-matter of the action ; (4) that the defendant has been guilty of a wrongful conversion.

CONVERSION (Equitable).—This is an extremely important doctrine of equity, and by which real estate

is, under certain circumstances, deemed to be impressed with the character of personal estate, and personal property with the character of real estate (1 L. C. 52 ; 2 Id. 27, 28 ; 3 Id. 34). A statement of the origin and effect of this doctrine will be found in Hayes' Convey., p. 84, 4th ed. ; also stated 1 L. C. 247, 248. The following is a more practical and detailed statement of the doctrine :—Where a person takes under a deed or will, property, which by that deed or will is directed to be converted, he takes it in the character which the instrument has impressed upon it. Thus, if lands are devised in trust to be sold, and the produce laid out on security or personal estate for the benefit of A. for life, with remainder to B. absolutely ; upon the decease of B. his personal representative would be entitled to the produce of the land, subject to the prior life interest, as part of his personal estate, although the lands should actually remain unsold ; while, in the converse case, namely, of money being directed to be laid out in land, to be settled (say) to the use of A. for life, with remainder to B. in fee, the money, though not laid out, would be real estate of B., and, as such, would, at his decease, devolve to his heir or devisee (Guidot v. Gu., 3 Atk. 254 ; Pulteney v. Da., 1 Bro. C. C. 224 ; Fletcher v. As., Id. 497 ; Att.-General v. Ho., 1 Pri. 426 ; Simpson v. As., 6 Beav. 412). In order, however, to change the property, the direction to convert must be absolute. Thus, if a discretion is lodged in trustees to invest money in land or personal security, there will be no conversion in law until there is a conversion



in fact (*Van v. Ba.*, 19 Ves. 102). And probably the same result will take place where the sale directed is to be with the approbation or consent of a third party. And though it is clear that real estate, absolutely directed to be sold, is transmissible, from the prescribed period of conversion, as personal estate, yet where a discretion is vested in trustees to suspend or delay the conversion, it may be a question whether the character of personalty is, during the suspension, impressed on the property; to exclude any such question, where a clause is inserted in the will authorising the trustees to delay the sale, a declaration should, says Mr. Jarman, not doubting its full efficacy, be added (if such be the intention) that the estate shall be absolutely impressed with the qualities of personal estate for the purposes of transmission, at the period when the same shall become saleable or convertible under the trusts of the will (11 Jarman. Convey. 651, note; but see *Briggs v. Ch.*, 21 L. T. R. 219, mentioned *infra*). Where the direction to sell is absolute, the devisee of the proceeds may bequeath it as personalty, though the land be not then actually sold, which is a strong proof that the conversion has been effectual (*Stead v. Ne.*, 2 Mer. 521; *Grievonson v. Ki.*, 2 Ke. 653). The reader may be inclined, perhaps, to ask how this clear conversion can be reconciled with the practice of conveyancers who in such cases are in the habit of treating the interest of the devisee, whilst the estate remains unsold, as both real and personal estate. This is done not merely as an excess of caution, as is too customary with some conveyancers, but to meet the case of the devisee

having elected to take the land in its unconverted state, and which, consequently, is thenceforth held as real estate. Such an election may be indicated by a very trifling act (but see *Re Stewart*, 16 Jur. 1063) where there is but one devisee, or several who will all so agree. Indeed, where there is any incapacity in the party, or one of the parties, no election can be made; but as to this it may be remarked that the ordinary statement that a married woman cannot elect should be restricted to the case of a devisee not taking for her separate use, for where the property is limited for the separate use of a married woman she is a *feme sole* with respect to it, and may make a binding election (*Carr. v. El.*, 2 Bro. C. C. 56). It may be added, if this were the place, that notwithstanding the doctrine of conversion by an absolute direction to sell is said to be a clear one, it is plain from many cases in which it is collaterally in question, no such conversion is considered to have taken place as to clearly make the interest of the parties entitled one in personalty simply. This is shown in the cases of *Fourdrin v. Go.* (3 Myl. and Ke. 383); *Du Hourmelin v. Sh.* (1 Beav. 79; 2 Jur. 69); and *Briggs v. Ch.* (21 L. T. R. 218, 219), in which latter case, though there was an express declaration that the power of suspending the sale and conversion by the will directed should not, in regard to the real estate, prevent it from being impressed with the character of personal estate immediately at the testator's decease, V. C. Stuart said: "The real estate in this instance not having been sold at the time the security was executed, the subject-

matter of it clearly constituted an interest in land." Now the rule that an absolute direction to sell real estate is a conversion so as to render the estate transmissible as personalty must be confined to the case of the devisee's interest under the will, and not to the case of the heir-at-law and next of kin putting in conflicting claims in consequence of a gift in the will failing to take effect. In fact, the difficulties, and it may be said the mistakes, which have arisen in applying the doctrine of conversion have arisen from not discriminating between the cases of a devisee living to be entitled to his gift; a contest between a residuary legatee and the heir on a gift failing; and a contest between the representatives of the heir entitled to an undisposed of interest. A conversion which, as regards one of these cases, may be what is called "out and out," may, with regard to another or others of them, be partial only; hence the necessity for bearing in mind the circumstances of each case, and applying them to the proper classes. That legatee's entry on, and continuance in, possession for three years of lands directed to be sold, will not amount to an election to take as realty, see *Dixon v. Ga.* (17 Beav. 438; 1 L. C. 297). That proceeds of real estate devised for sale, but being undisposed of, belong to the heir of the testator, though the trustees were to stand possessed of the proceeds as a fund of personal, and not real, estate, see *Fitch v. We.* (12 Jur. 645; 17 L. J. Ch. 361; 1 L. C. 249—251). That money paid into Court under a local act of the same effect as the Lands Clauses Consolidation Act, continues to be real estate, see *Reg. v. Ha.*,

(29 L. T. R. 49; 3 L. C. 369). That a part reconversion is not always an entire reconversion, especially where the estates are of different tenures, see *Meredith v. Vi.* (5 W. R. 639; 4 L. C. 43). That land directed to be sold is sometimes personal estate in the hands of the heir, see 4 L. C. 108). That the exercise, after a lessor's death, of a lessee's option to purchase the fee is a conversion into personalty, see *Collingwood v. Ro.* (3 Jur. N.S. 785; 4 L. C. 188, 206, 207). That where on a direction by deed to convert there is a partial failure of purpose, the undisposed of proceeds result to the party as personalty, see *Clarke v. Fr.* (6 W. R. 836; 5 L. C. 131).

**CONVEYANCE.**—An instrument of alienation by which an interest or estate in lands and tenements is conveyed from one person to another. They are either of record or not of record; and the latter are either at common law or by statute. The importance of conveyancing arises from the doctrine of law that all lands are holden by title (*F. Bk.* 165, et seq.; 1 St. C. 505, et seq., 4th ed.). The principles upon which conveyances are framed, together with the rules applicable to the alienation or disposal of real property, constitute that branch or department of the law popularly termed conveyancing; and the persons who confine their practice to this department are thence denominated conveyancers, and are mostly barristers, though some are merely certificated conveyancers (44 G. 3, c. 98, s. 14; 10 Ex. 293), taking out certificates like solicitors, and in effect acting and charging as such. There are

also certain counsel called the conveyancing counsel of the Court of Chancery, who advise on titles coming before the Court (15 & 16 V. c. 8., s. 40).

**CONVICTION.** — A conviction is either on an indictment or upon summary proceedings. The former is either by confession or by verdict (4 St. C. 500, 4th ed.). The latter is defined to be a record of the summary proceedings upon any statute inflicting penalties before one or more justices of the peace, or other persons duly authorised, in a case where the offender has been convicted and sentenced; and consists, first, of a written information or charge against the defendant; secondly, of a summons or warrant upon such information, in order that the defendant may make his defence; thirdly, his appearance or non-appearance; fourthly, his defence or confession; fifthly, the evidence against him in case he does not confess; and sixthly, the judgment or adjudication. The course of proceedings upon summary convictions in general has been regulated by the 11 & 12 V. c. 43 (see 4 St. C. 398, et seq., 4th ed.; F. Bk. 329, et seq.).

**CONVOCATIONS.** — Ecclesiastical assemblies, consisting of the representatives of the clergy of the respective provinces of Canterbury and York, convened for the purpose of consulting on ecclesiastical matters in time of Parliament (25 H. 8, c. 19; 2 St. C. 533, 535, 4th ed.).

**COPARCENARY.** — An estate held in coparcenary is where lands of in-

heritance descend from an ancestor to two or more persons. It arises either by common law or particular custom. By common law as where a person seised in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives, in this case they shall all inherit; and these co-heirs are then called coparceners, or parceners only, though in some respects the law considers them as together making only one heir (3 B. & Cr. 173). Coparceners by particular custom are where land descends, as in gavel-kind, to all the males in equal degree, as sons, brothers, uncles, &c. (Co. Litt. 163 b.; Vin. Ab. Parceners, 2; 1 St. C. 345, 4th ed.; F. Bk. 155; as to descent of shares, see 14 Jur. 214; see further, 1 L. C. 52, 96; 3 Id. 248, 283). The possession of one coparcener is not now that of the others (3 & 4 W. 4, c. 27, s. 12; 3 Jur. 1101).

**COPYHOLD.** — A copyhold estate is an estate the only visible title to which is the copy of the court rolls, which are made out by the steward of the manor on a tenant's being admitted to any parcel of land or tenement belonging to the manor. Originally copyholders were but villeins who held at the mere will of the lord, who might dispossess them whenever he pleased; and they held this land upon villein services, such as to carry out dung, to hedge and ditch the lord's demesnes, and such like. These villeins, however, in process of time came to enjoy their possessions without interruption in a regular course of descent, and the common law, of which custom is the life, now gave

them title to prescribe against their lords, and on performance of the same services, to hold their lands, in spite of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the customs of the manor, which customs are preserved and evidenced by the rolls of the several courts baron, in which they are entered or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And as such tenants had nothing to show for their estates but these customs and admissions in pursuance of them, entered on these rolls, or the copies of such entries witnessed by the steward, they now began to be called tenants by copy of court roll, and their tenure itself a copyhold. Copyholds are *parcel* of the manor, in which they differ from freeholds, which are held of the manor (1 Salk. 186). Sometimes the term copyhold is taken in a wider sense than that mentioned above, and then includes ancient demesne (ante, pp. 16, 17) and customary freehold (1 St. C. 224, 622, 4th ed.; F. Bk. 192).

#### COPYHOLD COMMISSIONERS. —

For the purpose of carrying into effect the provisions of the copyhold acts, certain persons have been appointed commissioners: their style is "The Copyhold Commissioners," and any two of them form a board. They have an official seal, with which all their documents are to be stamped. There are also assistant commissioners and secretary (4 & 5 V. c. 35, ss. 1—10; 14 & 15 V. c. 53; 20 V. c. 8). Their duties relate to the enfranchisement of copyholds

and the commutation of rents, &c., thereof (1 L. C. 265, 266).

**COPYRIGHT.**—The exclusive right which the law allows an author of printing and publishing his own original work. By the 5 & 6 V. c. 45 (repealing previous statutes), the copyright of every book, pamphlet, map, sheet of music, &c., published in the lifetime of its author, is to endure for his natural life, and for seven years longer; or if the seven years expire before the end of forty-two years from the time of publication, then for a period of such forty-two years, and in case of posthumous works for forty-two years absolutely. No privilege of copyright can, however, be claimed in any work of an immoral, blasphemous, seditious, or slanderous tendency (4 St. C. 34—42, 4th ed.; F. Bk. 199, 200; as to contributions to periodicals, see 2 L. C. 73, 75, 233). The work should be registered at Stationers' Hall (3 L. C. 185; 2 Id. 232, 233). As to international copyright, see 2 L. C. 233; 4 Id. 292. Copyright extends to engravings, ornamental designs, sculptures, &c. (2 L. C. 233; 4 L. C. 289—293).

**CORAM NON JUDICE.**—When the judge of any court exceeds his jurisdiction, the subject-matter with regard to which he has exercised such excess of jurisdiction, is said to be *coram non judice*. Thus in Coles's case (Sir W. Jones, 170), it was held, by the whole court, that if a justice does not pursue the form prescribed by the statute, the party need not bring a writ of error, because all is void, and *coram non judice* (1 Smith's L. C. 380.)

**CORONATORE ELIGENDO.**—The name of a writ, which after the death or discharge of any coroner is directed to the sheriff out of Chancery to call together the freeholders of the county, or district of a county, for the choice of a new coroner, and to certify into Chancery both the election and name of the party elected, and to give him his oath (2 St. C. 642, 4th ed.; 7 & 8 V. c. 92, repealing 58 G. 3, c. 95).

**CORONATORE EXONERANDO.**—A writ for the removal of a coroner, because he is engaged in other business, or is incapacitated by years or sickness or otherwise (1 Bl. C. 347; Exp. Parnell, 1 Jac. & W. 451).

**CORONER.**—An ancient officer at the common law, who has principally to do with pleas of the crown or such wherein the king is more immediately concerned. He is chosen by the freeholders at the county court, and is either for a whole county or for a district within a county (15 Jur. 558). In the cases of boroughs having separate courts of quarter sessions, the council appoints the coroner for the borough. In the counties and districts the coroner ought to have an estate sufficient to maintain the dignity of his office, and to answer any fines that may be set upon him for his misbehaviour, &c. The office and power of a coroner are either judicial or ministerial, but principally judicial. This is in a great measure ascertained by statute 4 Edw. 1, de officio coronatoria, and consists, first, in inquiring when any person is slain, or dies suddenly, or in prison, concerning the manner of his death.

And this must be *super visum corporis*, for if the body be not found the coroner cannot sit. He must also sit at the very place where the death happened; and his inquiry is made by a jury from four, five, or six of the neighbouring townships over whom he is to preside. If any be found guilty by this inquest of murder or other homicide, the coroner is to commit them to prison for further trial; or, in the case of manslaughter, may admit the accused to bail (22 & 23 V. c. 33, s. 1; 1 L. C. N. S. 247); and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby; but whether it be homicide or not, he must inquire whether any deodand has accrued to the king, or the lord of the franchise, by this death; and must certify the whole of this inquisition under his own seal and the seals of his jurors, together with the evidence thereon, to the Court of Queen's Bench, or the next assizes. Another branch of his office is to inquire concerning shipwrecks, and certify whether wreck or not, and who is in possession of the goods. Concerning treasure trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure (1 Bl. 348, 349; 2 St. C. 641—648, 4th ed.; F. Bk. 87).

**CORPORATION.**—A corporation is defined to be an assembly and joining together of many into one fellowship or brotherhood, whereof one is the head or chief, and the rest are the body. They are also called bodies politic or corporate, because they are incorporated, either by the sovereign's consent or by act of Parlia-

ment, i. e. made or united into one body. To illustrate this, let us consider the case of a college in either of our universities founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals that compose it might read, pray, study, and perform scholastic exercises together, so long as they could agree to do so; but they could neither frame nor receive any laws or rules of their conduct; none at least which would have any binding force for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities; for if such privileges be attacked, which of all this unconnected assembly has the right or ability to defend them? And when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students equally unconnected as themselves? So also with regard to holding estates or other property, if land be granted for purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to another, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law; as one person they have one will, which is collected from the sense of the majority of the individuals; this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic, or rules and statutes may be pre-

scribed to it at its creation, which are then in the place of natural laws. The privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successors; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies. The first division of corporations is into aggregate and sole. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever; of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which, in their natural persons, they could not have had. In this sense the sovereign is a sole corporation, so is a bishop, so are some deans and prebendaries distinct from their several chapters, and so is every parson and vicar. Another division of corporations, either sole or aggregate, is into ecclesiastical and lay. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons, such as bishops, certain deans, parsons, and vicars, which are sole corporations, and deans and chapters. Lay corporations are of two sorts, civil and eleemosynary. The civil are such as are erected for a variety of temporal purposes, as for the good

government of a town or particular district, as a mayor and commonalty, bailiff or burgesses or the like (usually termed municipal corporations), and some for the advancement and regulation of manufactures and commerce, as trading companies, with either limited or unlimited liability (2 L. C. 80—84, 91; F. Bk. 99; 4 L. C. 139—142; 3 Id. 175—177), for the better carrying on of divers special purposes, as churchwardens for conservation of the goods of a parish (*ante*, p. 127); the colleges of physicians and of surgeons in London for the improvement of medical science; the Royal Society for the advancement of natural knowledge, &c. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent, and all colleges, both in our universities and out of them; but the universities of Oxford and Cambridge are not eleemosynary corporations (Brow. R. P. St. 15; F. Bk. 95—101). One important privilege of a corporation is that its members have no personal liability (see *Finnis v. Yo.*, 6 W. R. 577; 31 L. T. R. 163; 1 Bl. C. 467—471; 3 St. C. 123—130, 4th ed.).

**CORRUPTION OF BLOOD.**—One of the immediate consequences of attainder for treason or murder (but not for other felonies) is corruption of blood, both upwards and downwards; so that such an attainted person cannot inherit lands or other hereditaments from his ancestors, nor retain those he already has, because his blood is considered in law

to be corrupted (4 Bl. C. 388; F. Bk. 160, 351; *ante*, pp. 32, 33).

**COSTS.**—The expenses which are incurred either in the prosecuting or the defending an action at law or suit in equity are called the costs. At common law, the costs follow the result of the action, except where the plaintiff ought to have sued in the county court, or, in general, where the verdict is under £20 (3 & 4 V. c. 24), or where the defendant has been arrested, and held to special bail for a greater amount than is recovered (43 G. 3, c. 46, s. 3), or where the defendant has been summoned in bankruptcy (12 & 13 V. c. 106, s. 86; 15 Jur. 166), and in some other instances. In equity, the giving of costs is almost discretionary, or, at least, the courts are in the habit of looking at the circumstances of each particular case before awarding costs: the grant or refusal is not, however, a merely capricious act (2 Dan. Ch. Pract. 1252, 1253, 2nd ed.). Costs between attorney or solicitor and client are those which the client always pays his attorney or solicitor whether such client is successful or not, and over and above what the attorney gets from the opposing party in case of such party having lost the action. Costs between party and party are those which the defeated party pays to the successful one as a matter of course. In equity, costs as between solicitor and client are sometimes directed to be paid; and, indeed, it is a general rule, that when personal representatives and other trustees are entitled to costs "out of the fund," such costs will be directed to be taxed as between solicitor and client (2 Russ. 93). And in an

administration suit, where the fund is deficient, the plaintiff is allowed his costs as between solicitor and client out of the fund realised by his exertions (2 Dan. Ch. Pract. 1315, 2nd ed.; *Waldron v. Fr.*, 10 Hare, App. x.).

**COSTS OF THE DAY.**—Whenever one of the parties in an action gives notice of his intention to proceed to trial at a specified time, and after having given such notice neglects so to do, or to countermand the notice within due time, he is liable to pay to the other party (if he appeared at the trial, 1 Jur. N. S. 688) such costs or expenses as he has been put to by reason of such notice, which costs are commonly called the costs of the day—i. e., the costs or expenses which have been incurred on the day fixed for the trial. These costs usually consist of the expenses incurred by witnesses and others in coming to the place of trial, and such other expenses as have necessarily been incurred in preparing for trial on the specified day (Com. L. Pract. 156; 6 Jur. 561; 1 L. C. 311). A side-bar rule may be drawn up on affidavit without motion (*R. G. H. T.*, 1858, pl. 39).

**COUNSEL.**—A term frequently used to indicate barristers-at-law (see p. 50).

**COUNSEL'S SIGNATURE.**—In former times the appearance of the parties to an action was actual and personal in open court, and the pleadings consisted of an oral altercation in presence of the judges. But this could be carried on by none but regular advocates (with the excep-

tion, as at the present day, of the party himself); and although the pleadings in an action are in the present day delivered in writing between the parties out of court, yet they are still supposed to be delivered orally as of old (at least for certain purposes), and till very lately when the pleadings contained any new affirmative matter, such as would formerly have been put forward by counsel on behalf of his client, they required to bear the signature of some counsel, or, in the Court of Common Pleas, of some serjeant (*Will. Plead.* 86; 2 Dowl. N. S. 226; *Step. on Pl.* 29); but by the C. L. P. Act, 1852, s. 85, the signature of counsel is not requisite to any pleading (22 L. J. C. P. 211). In equity, the signature of counsel is still required to pleadings, such as the bill, demurrer, and answer, and plea, if not taken by commissioners (see 15 & 16 V. c. 86, s. 21, abolishing commissions within the jurisdiction, *ante*, p. 142), and to some other documents (1 Dan. Ch. Pract. 45, 299, 545, 651, 697, 2nd ed.).

**COUNT.**—In common law pleadings a section of a declaration is so called. Where a plaintiff has several distinct causes of action, he is allowed to pursue them cumulatively in the same suit, subject to certain rules as to joining such demands only as are in the same rights (see Com. Law Prac. 7). Thus, he may join a claim of debt on bond with a claim of debt on simple contract, and pursue his remedy for both by the same action of debt. So, if several distinct trespasses have been committed, these may all form the subject of one declaration in tres-



pass; and though formerly otherwise, a plaintiff may now join in the same suit a claim of debt, and a complaint of trespass, provided they are in the same right (Com. L. Prac. 6, 7). Such different claims or complaints, when capable of being joined, constitute different parts or sections of the declaration; and are known in pleading by the description of several counts. The Plead. Rul. of T. T., 1853, provide that several counts on the same cause of action shall not be allowed, and any violation of this rule may be remedied by application to the court or a judge (Com. L. Prac. 113). Some counts are termed the common counts (see Exam. Answ. 82, No. V.). The word count is also used in real actions, as the name for the whole declaration (Steph. Plead. p. 295, and appendix; Will. Plead. 100, 307).

COUNTERPART.—Signifies little else than a copy of the original. Blackstone's definition of it is as follows:—When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts, though of late it is most frequent for all the parties to execute every part; which renders them all originals (2 Bl. C. 296; 1 St. C. 483, 4th ed.). The counterpart of a deed is admissible as original or primary evidence against the party executing it, and those claiming under him, though no notice to produce the other part has been given (Burleigh v. St., 5 T. R. 465; Paul v. Me., 5 M. & W. 309).

COUNTIES CORPORATE.—Are cer-

tain cities and towns, some with more, some with less territory annexed to them; to which, out of special grace and favour, the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county, but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, and many others (1 Bl. C. 113; 1 St. C. 133, 4th ed.; see 38 G. 3, c. 52; 2 W. 4, c. 45, s. 17; 5 & 6 Id. c. 76, ss. 61, 109).

COUNTIES PALATINE, so called a palatio; because the owners thereof (the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster) had therein *jura regalia*, as fully as the King had in his palace. They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace, all writs and indictments ran in their names, as in other counties in the King's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis* (1 Bl. C. 117). Chester has now ceased to be a county palatine, and the courts of the remaining counties have been remodelled (1 St. C. 130, 4th ed.; F. Bk. 368). Writs of *capias* and of execution out of the common law courts need not now be directed to the chancellors of the counties palatine (C. L. P. Act, 1852, s. 121; Com. L. Pract. 239). Records of the superior courts of common law are now brought to trial and entered and disposed of in counties palatine in the same manner as in other counties (C. L. P. Act, 1852, s.

103). And several other of the provisions of that act are, by s. 229, to apply to counties palatine, with the requisite modifications.

**COUNTRY.**—Is in law frequently used to signify a “jury of the country.” Thus it is laid down with regard to any matter of law, “that the country shall not inquire of it, but it ought to be adjudged by the court” (9 Rep. 25 a.). Formerly, pleas concluded either with a verification or to the “country,” but this is not now necessary (C. L. P. Act, 1852, s. 67).

**COUNTRY CAUSE.**—A cause in which the venue is laid in any other county than in London or Middlesex, is so termed, in contradistinction to a cause in which the venue is laid in London or Middlesex, and which is termed a town cause (Lush, 367). Formerly, a longer time was in general given for taking steps in country causes, but this distinction is abolished in most if not all cases.

**COURT BARON.**—The court baron is a court incident to every manor in the kingdom, and is held by the steward of the manor, and is of two natures; the one a customary court, appertaining entirely to copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to copyhold property; the other a court of common law, which is the freeholders' court, but is now, however, seldom held (3 Bl. C. 33; 3 St. C. 375, 4th ed.).

**COURTS CHRISTIAN.**—The various species of ecclesiastical courts which take cognisance of religious and

ecclesiastical matters, are called courts christian (*curiæ Christianitatis*), as distinguished from the civil courts (3 Bl. C. 64; 3 St. C. 423, 4th ed.).

**COURTS ECCLESIASTICAL.**—The ecclesiastical courts are those which are held by the sovereign's authority, as supreme head of the church, for the consideration of matters chiefly relating to religion. The causes till lately cognisable in these courts were of three sorts, pecuniary, matrimonial, and testamentary. The jurisdiction in matrimonial and testamentary causes has been transferred to the “Court for Divorce and Matrimonial Causes,” and the “Court of Probate” (see F. Bk. 362, 363; 20 & 21 V. cc. 77, 85; 22 & 23 V. c. 61; 1 L. C. N. S. 358). Pecuniary causes are such as arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff. The various species of ecclesiastical courts are as follow:—

1. The Archdeacon's Court is the most inferior court in the whole ecclesiastical polity. It is held in the archdeacon's absence, before a judge appointed by himself, and called his official; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's court of the diocese (p. 24).

2. The Consistory Court. See *ante*, p. 155.

3. The Court of Arches. See *ante*, p. 24.

4. The Court of Peculiars is a branch of and annexed to the Court of Arches. It has jurisdiction over all those parishes dispersed through the province of Canterbury, in the

midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions are originally cognisable by this court (3 St. C. 424, 425, 4th ed. ; 4 Jur. 937; F. Bk. 366).

**COURT LEET.**—This is a court of record held once in every year within a particular hundred, lordship, or manor, before the steward of the leet, for the preservation of peace, and the chastisement of divers minute offences (4 Bl. C. 273; 4 St. C. 386, 4th ed. ; F. Bk. 375).

**COURT MARTIAL.**—A military court authorised by the annual Mutiny Act for trying and punishing the military offences of soldiers in the army (2 St. C. 596, 4th ed.).

**COURT OF PIE-POUDRE.**—A court formerly held in fairs, to do justice to buyers and sellers, and for the redress of disorders committed therein (3 Bl. C. 33, 34; Bac. Abr. Court of Pie-poudre).

**COURTS AT WESTMINSTER.**—The superior courts, both of law and equity, have for several centuries been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. The courts of equity, however, sit at Westminster on the first day of term only (in fact, only when the chancellor gives a breakfast to the judges on the opening of the terms); at other times they sit in courts provided for the purpose in or near Lincoln's-inn.

**COURTS OF RECORD.**—Some courts are of record, others not of record:

a very important distinction, especially as to the punishment of contempts, and the effect of their decisions. Every court of record has authority to fine and imprison for contempt; but it is otherwise with those courts which are not of record, unless by statute (Bacon's Abr. Courts, E. ; 5 B. & Ald. 337, 894; 3 B. & C. 449). Nothing can be averred against a record, nor can any proof be adduced to contradict it: the record is its own proof; on any question arising as to the proceedings of courts not of record, it must be decided by a jury (Co. Litt. 260; 3 Bl. C. 24; 3 St. C. 364, 365, 4th ed.).

**COURTS OF THE UNIVERSITIES.**—The chancellors' courts in the two universities of England (though as to Cambridge this is restricted by the 19 & 20 V. c. xvii. ; 3 St. C. 441, n. 4th ed.) enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, when a scholar or privileged person is one of the parties; excepting in such cases where the right of freehold is concerned. These privileges were granted in order that the students might not be distracted from their studies by legal process from distant courts and other forensic avocations. And these courts are at liberty to try and determine either according to the common law of the land, or according to their own local customs, at their discretion (3 Bl. C. 83; 3 St. C. 585, 4th ed.).

**COVENANT.**—A covenant is a kind of promise, contained in a deed, to do a direct act, or to omit one; and is a species of express contract, the

violation or breach of which is a civil injury. The person who makes such a covenant is termed the covenantor, and he with whom it is made the covenantee. When the covenantor covenants for himself and his heirs, it is sometimes called a covenant real, and descends upon the heirs, who are bound to perform it to the extent of assets descended; when he covenants for his executors and administrators, it is said to be a personal covenant, and binds his personal representatives, which it would do if the words "executors and administrators" were omitted, for they are implied (Com. L. Princ. 97, 144, 268). Covenants are also said to be express or implied; express, when they are literally expressed or inserted in the deed; implied, when not inserted or expressed in the deed, but which the law implies as a matter of course; as if A. demise a house and land to B. for a certain term of years, and in the lease creating such demise there is no covenant on the part of A. that B. shall enjoy the premises quietly during the term; in this case the law very justly supposes that although A. has not formally entered into such a covenant, yet that it must or ought to be his intention to permit B. to quietly enjoy the premises demised to him, and therefore it considers such a covenant on the part of A. as implied (3 Bl. C. 156; see further Com. L. Princ. 24). Covenants are said to run with the land when they affect or are intimately attached to the thing granted, as a covenant to repair, to pay rent, &c., and such covenants in a lease bind not only the lessee, but his assignee also (2 Chitty's Bl. 303, n. 16; Com. L.

Princ. pp. 252—259). The subject of covenants has been so fully noticed in Com. L. Princ. 244—285, that it is thought best to refer the reader thereto.

**COVENANT TO STAND SEISED TO USES.**—A species of conveyance by which a man seized of lands covenants in consideration of blood or marriage that he will stand seized of the same to the use of his child, wife, or kinsman, for life, in tail, or in fee (2 Bl. C. 338; F. Bk. 178, 179; 3 L. C. 166, 167; 20 L. J. C. P. 223).

**COVERTURE.**—By marriage the husband and wife become for most purposes one person in law—i. e., the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband, under whose protection she performs every thing; and she is called a feme covert; is said to be covert baron, i. e., under the protection and influence of her husband or baron; and her condition during her marriage is called her coverture (1 Bl. C. 442, 444; 2 St. C. 273, *et seq.*, 4th ed.; F. Bk. 109—111).

**COVIN.**—A deceitful compact or agreement to the prejudice or injury of any person (Com. Dig. tit. Covin). The term is usually used in connection with fraud: as "Fraud and Covin:" as to a plea thereof and the evidence to support, see 5 Jur. 1010.

**CREATION OF ESTATES.**—An estate is said to be created when an interest in lands is called into exist-

ence by the operation of some assurance, conveyance, or other legal instrument. Thus, if A. grant a lease of lands to B. for seven years, an estate for years would be said to be created by the operation of the instrument of demise; that is to say, it would be called into existence by the grantor, through the agency of the lease or demise, in the same way that an obligation may be said to be created on the part of one who promises to do a given act, through the force or operation of the promise. Where an existing estate is dealt with, it is, if a chattel interest, said to be assigned; if for a greater interest, transferred or granted—though the fee simple can scarcely be said to be granted. In the creation of different estates or interests, different words are required to be used descriptive of the nature and extent of the estate or interest to be created. Thus, a conveyance to the use of A. and his heirs, creates or rather transfers an estate in fee simple, or, in other words, imparts or rather transfers to A. the absolute property in the lands conveyed. If the words heirs of his body, it would be only an estate in tail general, so that any heir of his body might inherit.

**CRIMES.**—Wrongs are divisible into two sorts, namely, civil injuries and crimes. The distinction between a crime and a civil injury is, that the former is a breach and violation of the rights and duties considered with reference to the whole community, considered as such, in its social aggregate capacity; whereas the latter is an infringement or privation of the rights considered with reference to individuals merely

in their individual capacity (4 Bl. C. 4; 3 St. C. 834, 4th ed.; F. Bk. 292).

**CROFT.**—A word frequently inserted in conveyances of land, and signifying a small enclosed close adjoining to a dwelling-house.

**CROSS-ACTION.**—Where A. having brought an action against B., B. brings an action against A. upon the same subject-matter, or arising out of the same transaction, this second action is called a cross-action. The law endeavours as much as possible to avoid the necessity of cross-actions, preventing circuity of actions (p. 129), and in particular the legislature has, by the statutes of set off, given in many cases a defence in respect of what must otherwise have been the subject of a cross-action. Even now, cross-actions are sometimes necessary to insure justice to both parties; as in the case of a contract in which neither of the contractors is subjected to any condition precedent (p. 151) to his right to enforce performance by the other of his part; but the promises on each side are independent of what is to be done upon the other. In such a case the non-performance of the plaintiff's promises would be no defence to an action for the non-performance of the defendant's, whose sole remedy, therefore, against the plaintiff is by a cross-action (Smith's L. C. 4—15; *ante*, p. 151).

**CROSS BILL.**—In general when discovery from the plaintiff, either concerning matters of fact or the contents of documents, became necessary to enable a defendant to a suit to complete his defence to a

case sought to be established against him, he could only obtain such discovery by means of a cross bill. It is true, indeed, that the Evidence Act (14 & 15 V. c. 99, s. 3) enables a defendant to examine the plaintiff, but this is only, in fact, as a witness, and subject to the same rules. The 15 & 16 V. c. 86, s. 19, enables a defendant requiring a discovery from the plaintiff to a suit instead of filing a cross bill of discovery, to file interrogatories for the examination of the plaintiff. On a copy being delivered, the plaintiff must answer the interrogatories, in like manner and within such time as if they had been contained in a bill of discovery, and he had appeared thereto on the day of the filing thereof. The answers to such interrogatories may be excepted to for scandal or insufficiency. A defendant may, if he please, file a cross bill of discovery, instead of interrogatories. The statute enacts that it shall be lawful for any defendant in any suit, but where the defendant is required to answer, not until after he shall have put in a sufficient answer to the bill, and without filing any cross bill of discovery, to file in the record office of the court interrogatories for the examination of the plaintiff, to which shall be prefixed a concise statement of the subjects on which a discovery is sought, and to deliver a copy of such interrogatories to the plaintiff or his solicitor; and such plaintiff shall be bound to answer such interrogatories, in like manner as if the same had been contained in a bill of discovery filed by the defendant against him on the day when such interrogatories shall have been filed, and as if the defendant to such bill of discovery had on the same

day duly appeared; and the practice of the court with reference to excepting to answers for insufficiency, or for scandal, shall extend and be applicable to answers put in to such interrogatories; provided that in determining the materiality or relevancy of any such answer, or of any exception thereto, the Court is to have regard to the statements contained in the original bill, and in the answer which may have been put in thereto by the defendant exhibiting such interrogatories for the examination of the plaintiff: provided also, that a defendant, if he shall think fit so to do, may exhibit a cross bill of discovery against the plaintiff, instead of filing interrogatories for his examination. It will be seen that a defendant required to answer the original bill, is not to file interrogatories until after he has put in a sufficient answer to the bill; now an answer is not considered sufficient, though not excepted to, until six weeks after the filing thereof, from which the vacations are to be excluded (Cons. ord. H. T. 1860, xvi, r. 6). As a plaintiff has sixteen days after service of a copy of the bill (Cons. ord. H. T. 1860, xi, r. 2) to file interrogatories for the examination of the defendant, no interrogatories under the above 19th section can be filed, until after that time, as not till then can it be ascertained that the defendant will not be required to answer the bill. There is no time limited for the filing of the defendant's interrogatories, nor for the delivery thereof, though it is otherwise with the plaintiff's interrogatories.

**CROSSED CHEQUES.**—The title "Cheque" having been acciden-

tally omitted in its proper place, the deficiency is now supplied. A cheque on a banker is in legal effect an inland bill of exchange payable on demand. It is consequently subject, in general, to the rules which regulate the rights and liabilities of parties to bills of exchange (Byles on Bills, 6th ed. p. 10). The payee may, upon the non-payment by the banker, sue the drawer for the amount, and to entitle him to do so, he is not in general bound to present the cheque at the bank within any given time. It has been said that it may be presented at any time within six years (see *Robinson v. Ha.*, 9 Q. B. R. 52; 15 L. J. Q. B. 377). In case, however, of the failure of the banker, and the non-payment of the cheque on that account, it is necessary to entitle the holder to sue the drawer, that the cheque should be presented for payment immediately. If the payee live in the same place as the banker, he must present the cheque on the same or the following day; if he do not live in the same place, he must cause it to be presented on or before the third day. Where the cheque is circulated from hand to hand, the liability of the drawer, in case of the failure of the bank, cannot, it seems, be enlarged by that circumstance; and therefore, in order to charge him if the bank fail, the cheque, in whose hands soever it be, must be presented within the period within which the payee or first holder must have presented it; but as against the party transferring the cheque to the holder, it is sufficient, whatever be the date of the cheque, to present it or forward it for presentment on the day next after the transfer (Byles on Bills, 6th ed. p. 15). The prac-

tice of crossing cheques with the name of a banker was discussed in *Bellamy v. Ma.* (7 Ex. 389), and it was held that such crossing does not restrain the negotiability of a cheque payable to bearer, but is only to secure, as far as possible, payment to bona fide holders; and if the banker were to pay such draft to any one who presents, except through some banker, it would be evidence of negligence as between him and his customer. In *Carlton v. Ir.* (5 El. & Bl. 765) this ruling was recognised. In *Simmonds v. Ta.* (2 Jur. N. S. 1305) it was held, that the crossing formed no part of the cheque; and, if erased before presentment to the banker, the latter was justified in paying it, though the presenter was not a banker (4 L. C. 109, 239; 5 Id. 12). Since these decisions, the 19 & 20 V. c. 25, has enacted, that, whenever a cheque or draft on any banker, payable to bearer or to order on demand, shall be issued, crossed with the name of a banker, or with two transverse lines with the words "and company," or with the abbreviation thereof, such crossing shall be deemed a material part of the cheque or draft, and except as mentioned, shall not be obliterated, or added to, or altered by any person whomsoever after the issuing thereof, and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be crossed, or if the same be crossed without a banker's name, to any other than a banker. Whenever any such cheque or draft shall have been issued uncrossed, or shall be crossed with the words "and company," or any ab-

breveation thereof, and without the name of any banker, any lawful owner of any such cheque or draft, while the same remains so uncrossed, or crossed with the words "and company," or any abbreviation thereof, without the name of any banker, may cross the same with the name of a banker; and whenever any such cheque or draft shall be uncrossed, any such lawful holder may cross the same with the words "and company," or any abbreviation thereof, with or without the name of a banker, and any such crossing shall be deemed a material part of the cheque or draft, and shall not be obliterated, or added to, or altered by any person whatsoever, after the making thereof; and the banker upon whom such cheque or draft shall be drawn, shall not pay such cheque or draft to any other than a banker, with whose name the cheque or draft shall be so crossed. Further the act declares that persons obliterating or altering the crossing with intent to defraud shall be deemed guilty of felony. Bankers are not to be responsible for paying a cheque which does not plainly appear to have been crossed or altered. The word "banker" is to include any person, corporation, or joint-stock companies acting as bankers. On this statute it is observed in the last edit. of Roscoe's Ev. (p. 290) "It might seem that this provision is a declaratory one; but it may, perhaps, be considered as extending the former practice to cheques payable 'to order,' and as prohibiting payment except through a banker; whereas before the act, the banker was justified in paying the bearer in person, if he were a rightful owner."

**CROSS DEMANDS.**—These arise where one man against whom a demand is made by another, in his turn makes a demand against that other, and of such cross demand a set-off is in law the most familiar instance, a set-off being a statutory right of balancing mutual debts between the plaintiff and defendant in an action (1 Chit. Pl. 596).

**CROWN CASES RESERVED.**—By the 11 & 12 V. c. 78, difficult questions of law arising on criminal trials may be reserved for the consideration of the judges: these are called crown cases reserved, and the court is termed the Court of Criminal Appeal, as to which see *ante*, pp. 92—96.

**CROWN COURT.**—Is the court in which the crown or criminal business of the assizes is transacted.

**CROWN DEBTS.**—Debts due to the crown. In the payment of debts by an executor or administrator, these claim the precedence to all other debts, prior or subsequent; but the debts so privileged are confined to such as are due by matter of record or specialty (2 Wms. Ex. 793; 5 Jarm. Conv. 64 f., 79, Sw.). As to purchasers or mortgagees, crown debts to obtain priority must be registered and re-registered every five years (2 & 3 V. c. 11, s. 8; 22 & 23 V. c. 35, s. 22; 1 L. C. N. S. 323, 328, 329). The last act extends to creditors.

**CROWN LAW.**—That part of the law which is applicable to criminal matters (Com. Dig. tit. Ley A.).

**CROWN OFFICE.**—An office of the



Court of Queen's Bench. In this office are exhibited informations for crimes and misdemeanors. The 6 & 7 V. c. 20, threw the court open to attorneys, and abolished several of the offices.

**CROWN PAPER.**—A paper containing the list of cases on the Crown side which await the hearing or decision of the Court of Queen's Bench; it includes all cases arising from informations *quo warranto*, criminal informations, criminal cases brought up from inferior courts by writ of *certiorari*, and cases from the sessions (Bagley's Pr. 559).

**CROWN SIDE** is the side or department of the assize court, in which the criminal business is disposed of.

**CROWN SOLICITOR.**—The solicitor to the Treasury acts, in state prosecutions, as solicitor for the Crown in preparing the prosecution.

**CUM TESTAMENTO ANNEXO.**—Where a deceased person has made a will, but without naming any executor, or has named incapable persons; or where the executors appointed refuse to act, or die intestate, or under 20 & 21 V. c. 77, s. 73; in any of these cases the administration *cum testamento annexo* (with the will annexed) must be granted to some other person, in the choice of whom the residuary legatee is preferred to the next of kin (1 Wms. Exors. 348; Coote's Prob. 44, 2nd ed.).

**CUMULATIVE LEGACY.**—Legacies are said to be cumulative as contradistinguished from such as are merely

repeated. Where the testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee be entitled to both, i. e., whether the second legacy shall be regarded as a repetition merely of the prior bequest, or as an additional bounty and cumulative to the other's benefit. On this point the intention of the testator is the rule of construction (2 Wms. Exors. 1620; 1 L. C. N. S. 304; 5 Bac. Abr. 141, 7th ed.). As Sir J. Wigram stated in *Lee v. Pa.* (8 Jur. 706), "The tendency of all the modern decisions has been in favour of cumulation. The gifts being by different instruments, are *primâ facie* cumulative. The gifts are several, and effect must, *primâ facie*, be given to each gift; for that reason they are held, *primâ facie*, to be cumulative." No extrinsic evidence is admissible to prove that the two legacies were not intended (*Ib.*).

**CUR. ADV. VULT.**—An abbreviation of *Curia advisari vult*.

**CURATES.**—By this term is usually intended the temporary ministers employed by the rector or vicar; but there is another class, termed perpetual curates (F. Bk. 76, 77; 17 L. J. Q. B. 366; 13 Jur. 793; 3 & 4 V. c. 113). That a perpetual curate is capable of holding lands in fee, see 13 Jur. 793; as to the difference between a perpetual curate and a vicar, see *Ibid.*

**CURATOR.**—In the Roman laws was the same as the committee of an infant's estate is in our law; the guardian performing with us the office both of tutor and curator of the Roman laws (1 Bl. C. 460).

**CURE BY VERDICT.**—After a cause has been sent down to trial, the trial had, and the verdict given, the courts overlook defects, in the statement of a title, which would be fatal on a demurrer, or if taken at an earlier period. This is what is meant by the term to cure by verdict; and the reason of it is, that the courts presume that all circumstances necessary in form or substance to complete a title imperfectly stated, were proved before the verdict was given; which reason explains the limitation laid down as to the effect of the verdict, viz., that it cures the statement of a title defectively set out, but not of a defective title; for where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption (1 Smith's L. C. 338; 1 Wms. Saund. 227, 228, n. 1; Will. Plead. 189). By the C. L. P. Act, 1852, ss. 50, 51, no judgment is to be arrested, stayed, or reversed for any imperfection, defect in, or lack of form (*ante*, p. 26).

**CURIA ADVISARI VULT.**—The courts sometimes take time to deliberate before giving judgment when the point before them is one of difficulty. This suspension of judgment was usually signified by the entry of the words "*curia advisari vult*," meaning that they wish to take time to consider; but by R. G. T. T., 1853, p. 31, no entry of "*curia advisari vult*" is to be made upon any record or roll whatever, or in the pleadings.

**CURTESY OF ENGLAND.**—When a man marries a woman seised of an

estate of inheritance, i. e. of lands and tenements in fee simple, or fee tail, and has by her issue born alive; which was capable of inheriting her estate; in this case he shall, on the death of his wife, hold the lands for his life as tenant by the curtesy of England (Litt. 35, 52; 2 Bl. C. 126). In the case of gavelkind lands the husband has but a moiety, but then the birth of issue is not a pre-requisite. There is no curtesy of copyholds without a special custom. The husband was always entitled to curtesy of a trust or equity of redemption (see Litt. s. 35, and note). As to the effect of the Inheritance Act, see Litt. s. 52, and note; 10 Jur. 115; 9 Id. pt. 2, p. 94.

**CURTILAGE.**—A piece of ground lying near and belonging to a dwelling house, as a court-yard, or the like.

**CUSTOM.**—Is a law not written, established by long usage and consent. Customs are either general or particular; general customs are the universal rule of the whole kingdom, and form the common law in its stricter and more usual signification: particular customs are those which for the most part affect only the inhabitants of particular districts, such as gavelkind in Kent, and the like. We must refer the reader for further information to F. Bk. pp. 2—13.

**CUSTOMS OF LONDON.**—These are particular customs relating to the government of the city of London, and also to trade, apprentices, widows, orphans, &c. They differ from all others in point of trial, for if the

existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their recorder, unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c., for then the law does not permit them to certify on their own behalf (1 Bl. C. 76). Some of the customs of London, including the distribution of the property of free-men dying intestate, have been abrogated (see F. Bk. 7, 8; 19 & 20 V. c. 94; 3 L. C. 178, 240, 252).

**CUSTOM OF MERCHANTS.**—A particular system of customs, originally different from the general rules of the common law, yet now engrafted into and become part of it, being allowed for the benefit of trade to be of the utmost validity in all commercial transactions, it being a maxim of law *cuiuslibet in sua arte credendum est* (see *Maxims*). This *lex mercatoria* or custom of merchants comprehends the laws relating to bills of exchange, liens, mercantile contracts, sale, purchase, and barter of goods, freight, insurance, &c. (1 Chit. Bl. 76, and note 9; F. Bk. 8).

**CUSTOMARY FREEHOLDS.**—This is a tenure by which tenants hold their estates according to the custom of the manor, but not at the will of the lord. A copyhold tenant is so called because he holds his estate by copy of court roll at the will of the lord according to the custom of the manor (pp. 164, 165); and although a distinction exists between a copyholder and a customary freeholder, namely, that the latter does

not like the former hold at the will of the lord, yet they both agree in substance and kind of tenure, *i. e.*, by custom and continuance of time (2 Bla. C. 148; 1 St. C. 226, 4th ed.; Burt. Comp. pl. 1283, 1287). In some instances a bargain and sale is employed instead of a surrender (4 Ea. 271; Burt. pl. 1283).

**CUSTOS ROTULORUM.**—A special officer to whose custody the records or rolls of the sessions are committed; he is always a justice of the quorum, and is usually selected either for his skill or credit; his nomination is by the sovereign's sign manual, and to him the nomination of the clerk of the peace belongs, which office he is expressly forbidden to sell for money (37 H. 8, c. 1; 4 Bl. C. 272; 4 St. C. 384, 4th ed.; *ante*, p. 134).

**CY-PRES.**—This term means "as near as"—a kind of approximation—and is applied to cases of charities, perpetuities, and powers. Thus, when the donee of a power has by will endeavoured to do that which he cannot legally do, the courts have endeavoured, by cutting out the particular direction which is illegal, to give such estates to the parties as will carry out what is termed the general intent, but this is not applicable to personal estate (*Tud. Real Prop.* 311). So in cases where an attempt is made to create a perpetuity—*i. e.*, to limit the estate to several successive lives in futuro, there is a material difference between a deed and a will; for in the case of a deed all the limitations are totally void; but in the case of a will, the courts do not, if they can possibly avoid it, construe the devise to be

utterly void, but explain the will in such a manner as to carry the testator's intention into effect, as far as the rules respecting perpetuities will allow, which is called a construction *cy-près* (6 Cru. Dig. 165; Tud. R. Prop. 383). As to charities where a testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated will not be allowed to destroy the charity: if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes (Tud. R. Prop. 439, 440).

**DAMAGES.**—A compensation and satisfaction given to a man by a jury for some injury by him sustained; as for a battery, for an imprisonment, for slander, or for trespass (2 Bl. C. 438). The measure of damages is a point frequently arising, and upon which there is a good American work by Mr. Sedgwick (see 1 L. C. 15; 3 Id. 259, 298; 4 Id. 89, 120, 381).

**DAMAGE-FEASANT.**—One of the injuries for which a distress may be had, is where a man finds the beasts (see 2 El. & B. 793) of a stranger wandering in his grounds, damage feasant—i. e., doing him hurt or damage, by treading down his grass or the like, in which case (if the beasts have not entered through defect of fences) the owner of the soil may, even in the night, distrain them, until satisfaction be made him for the injury he has thereby sustained (3 Bl. C. 7; 3 St. C. 339, 341, 489). There can be no sale of the beasts; there is a mere right of detainer until satisfaction made.

**DAMNUM ABSQUE INJURIA.**—Though an action will lie for an injury, though unattended with actual loss or damage, yet none can be maintained even for loss or damage actually inflicted, unless it result from an injury, it being a maxim that "*damnum absque injuria*" is not actionable. Thus, if a man commence a business in any particular place, another man may do the same thing in the same place, even though he draw away the business from the other, this being *damnum absque injuria*, a damage without an injury (3 Salk. 10; 3 St. C. 454, 466, 491, note, 494, 4th ed.).

**DAY.**—In the space of a day all the twenty-four hours are usually reckoned. Therefore, in general, if I am bound to pay money on a certain day, I discharge the obligation if I pay it before twelve o'clock at night, after which the following day commences (1 St. C. 283, 4th ed.). The word "*days*" used alone in a clause of demurrage for unloading in the River Thames is said not to include Sundays or holidays, by usage among merchants in London, but means working days only (Abbott on Sh. 264). In general, the law does not notice fractions of a day; but where injustice would arise, this rule is not adhered to strictly (*ante*, p. 149; 1 L. C. N. S. 190).

**DEAN.**—An ecclesiastical dignitary, probably so called because he presided over ten canons or prebendaries at least; he is next in rank to the bishop, and is head of the chapter of a cathedral. A dean and chapter is a spiritual corporation, and form together the council of the bishop, to assist him with their ad-

vice in affairs of religion and also in the temporal concerns of his see. All ancient deans were elected by the chapter, by *congé d'eslire* from the king, and letters missive of recommendation, in the same manner as bishops; but in those chapters that were founded by Henry VIII. out of the spoils of the dissolved monasteries, the deanery is donative, and the installation merely by the king's letters patent; and this is now the case with the ancient deaneries. The other members of the chapter are called canons (3 St. C. 16—18, 4th ed.).

**DEBENTURE.**—An instrument in the nature of a bond or bill to charge the government or company issuing it with the payment of a certain sum of money to the person advancing the same or his assigns. There are debentures also used in mercantile transactions at the custom-house (41 G. 3, c. 75, s. 7; 3 & 4 W. 4, c. 52, s. 86).

**DEBET ET DETINET.** — Words usually inserted in the declaration in an action of debt: as “and the plaintiff demands of the defendant the sum of £—, which the defendant owes to and unjustly detains from him.” Both of these words were generally introduced; for the rule was that “the declaration should be in the *debet* and *detinet*,” but in actions against, or by, executors or administrators, the declaration should in strictness have been only in the *detinet*, but if “owes to and” were untechnically inserted, it was no ground of demurrer nor an irregularity. And in debt for specific goods also, the declaration should have been in the *detinet* only

(1 Chitty Pl. 374). The declaration now merely concludes “And the plaintiff claims £—;” or a return of specific goods and “£— for their detention,” so that there is now no clause of *debet et detinet*.

**DE BONIS NON.**—Title by administration, differing from that of an executor created by will, never devolves from one person to another by representative right, and consequently the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. In every case, therefore, of an administrator's death, or of the death of an executor who has appointed no executor to represent him, it is necessary to commit administration afresh of the goods of the deceased, not administered by the former executor or administrator. And this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property (2 St. C. 209, 4th ed.; 1 L. C. 105).

**DEBT.**—The legal signification of debt is a sum of money due by certain and express agreement: as by a bond for a determinate sum; a bill of exchange, or a promissory note, or a rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of debt, to compel the performance of the contract and to recover the specific sum due. Debts are either debts of record, specialty debts, or simple contract debts (2 L. C. 347; 3 Id. 8, 9). Debts of record are the highest and most im-

portant kind, and are such debts as appear to be due by the evidence of a court of record, as a sum of money recovered by a plaintiff against a defendant in an action at law; for this having been adjudged due from the defendant to the plaintiff by the sentence of the court is considered a contract of the highest nature. Debts upon recognisance are also sums of money recognised or acknowledged to be due to a party, in the presence of some court, or magistrate, and these, together with statutes merchant, and statutes staple, &c., are also ranked among this first class of debts, viz., debts of record; since the contract on which they are founded is witnessed by the highest kind of evidence, viz., by matter of record. Specialty debts are such as become due or are acknowledged to be due by some deed or instrument under seal; as by a deed of covenant, by lease reserving rent, or by bond or obligation; thus in the case of a lease where rent is reserved, if the lessee omits to pay such rent as in the lease he covenants to pay, the debt which he thus incurs is a specialty debt; and these kind of debts are looked upon as the next in importance to those of record, because they are confirmed by special evidence under seal. Simple contract debts are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor by deed or instrument under seal, but merely by oral evidence or by some written agreement or contract not under seal; as where the only evidence of such debt is a verbal promise, or a bill of exchange, or promissory note, or the like; and these are considered in law as belonging to the least important of the

three classes of debts above mentioned (2 Bl. C. 464—467; 2 St. C. 140; 3 Id. 449, 562, 4th ed.; F. Bk. 209, 210; 2 L. C. 347; 3 Id. 8, 9).

**DECLARATION.**—In an action at law signifies the plaintiff's statement of his cause of action; wherein he declares the reason of his complaint, and states the nature and quality of his case. The declaration is generally divided into counts, each of which contains, or ought to contain, a distinct ground of complaint. Its parts and particular requisites consist in the title of the court in which the action is brought, and of the day of its being put in; the venue, or county, mentioned in the margin, and wherein all matters stated in the declaration are supposed to have taken place; the commencement; the statement of the cause of action; and the conclusion (3 Chit. Bl. 393, note 2). By the C. L. P. Act, 1852, the declaration is to commence as follows [venue]: "A. B., by E. F., his attorney [or in person], sues C. D. for [stating the cause of action], and is to conclude thus: 'And the plaintiff claims £—' [or, if to recover specific goods, 'The plaintiff claims a return of the said goods, or their value, and £— for their detention.']" Schedule B. to the act contains forms of statements of most of the ordinary causes of action (see Com. Law Pract. 108—113). In general, several counts on the same cause of action are not allowable, and any superfluous ones may be struck out by application to a judge or the court (R. G. T. T. 1853; Com. Law Pract. 113, 114).

**DECLARATORY ACT.**—An act of Parliament which, in cases of doubt

as to any doctrine or custom, declares what the law is at the time of its enactment, and the object of which is, as commonly set forth in the preamble, to remove the doubts which have arisen on the subject. Thus, the Statute of Treasons (25 Edw. 3, c. 2) makes not any new species of treasons, but only for the benefit of the subject declares and enumerates the several kinds of offence which before were treason at the common law (1 St. C. 71, 4th ed.; F. Bk. 21).

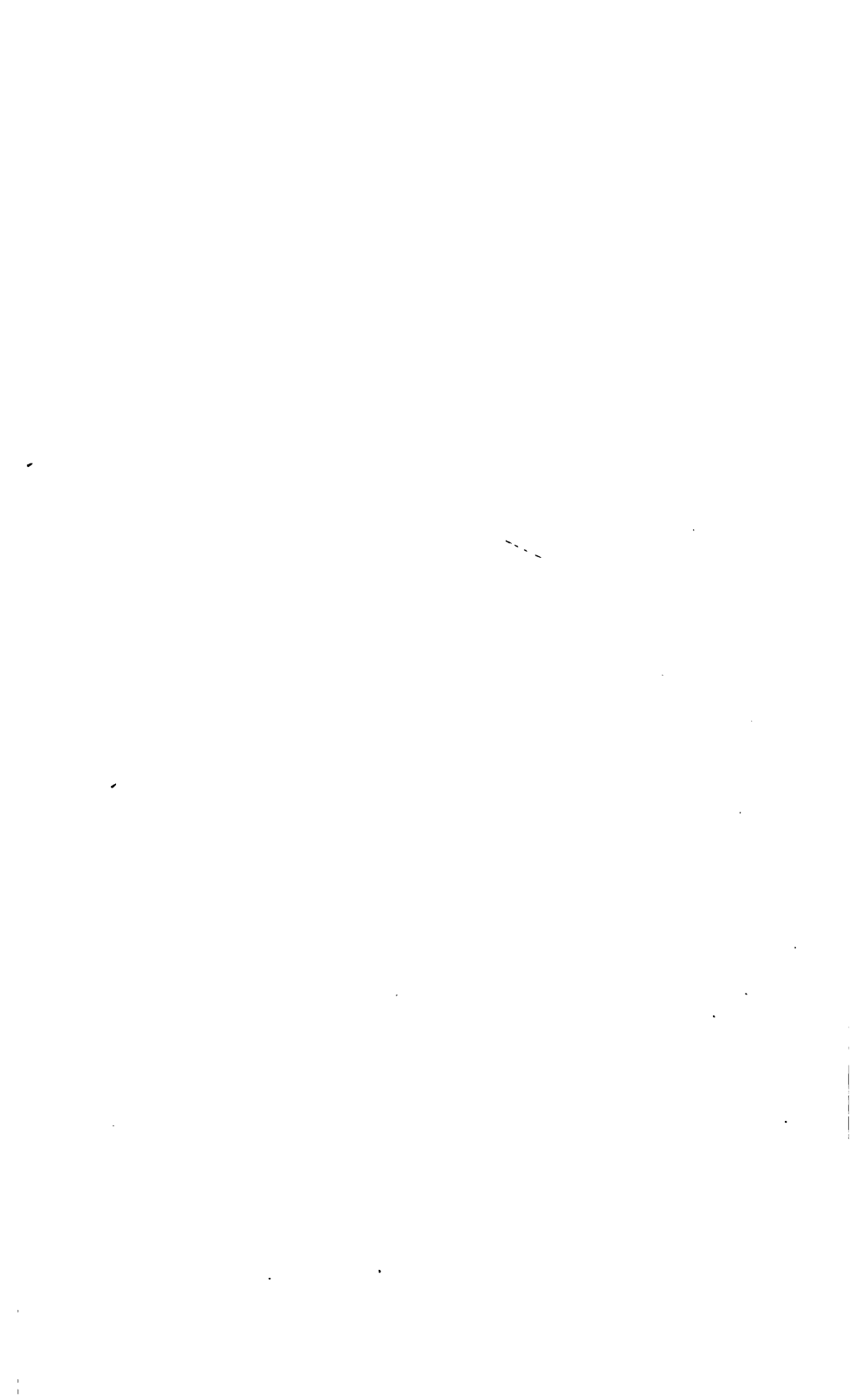
**DECLARING A USE.**—Pointing out, stating, or declaring for whose use or benefit lands previously conveyed to a trustee are to be held by such trustee. The party who so conveyed lands to a trustee, usually declared his intention with regard to them by a subsequent deed or instrument, which was thence termed a “deed to declare the uses.” It was thus opposed to a deed executed before a fine or recovery, which, if stating the uses thereof, was said to lead the uses of a fine or recovery. There existed important distinctions between the two, but as fines and recoveries are now abolished these are no longer necessary to be known, except as to old deeds (F. Bk. 179; 3 L. C. 167).

**DECREE.**—The judgment of a court of equity is so called, and it is of much the same nature as a judgment at common law. More technically, a decree is defined as the sentence or order of the Court of Chancery, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit, according to equity and good conscience. A decree is either interlocutory or

final. An interlocutory decree is when the consideration of the particular question to be determined, or of further consideration generally, is reserved till a future hearing; and the further hearing is termed a hearing upon further consideration, or upon equity reserved (2 Dan. Pract. 979, 2nd ed.). Indeed, in strictness, a decree is interlocutory until it is signed and enrolled, but the term is more generally applied to decrees in which some inquiry as to matter either of law or of fact is directed preparatory to a final decision (1 Newl. 322). When a decree does not reserve the consideration of the points of equity arising upon the determination of the legal rights of the parties, or of the further directions consequent upon the master's report or the costs of the suit, it is said to be a final decree, and, when duly signed and enrolled, may be pleaded in bar to any new bill for the same matter. Decrees may conveniently be divided into four classes:—1st. Decrees made in the hearing of all parties in the cause; 2nd. Decrees by default; 3rd. Decrees by consent; and, 4th. Decrees made upon taking the bill pro confesso. When the decree is made upon the hearing of the cause, in the presence of all parties, it necessarily varies according to the particular nature of the suit, and the relief prayed for by the bill. In case the *plaintiff* does not appear at the hearing, the defendant, on producing an affidavit in court of his having been served with a subpoena to hear judgment, may have the bill dismissed, with costs against the plaintiff (Ord. Hil. T. 1860, xxiii. r. 13). Formerly, if the *defendant* made default by not appearing at











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